(22,996)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 506.

EDWIN L. GAUTHIER, PLAINTIFF IN ERROR,

vs.

PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS, AND MINNIE SAUNDERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 25, 1912.

1 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 30155.

EDWIN L. GAUTHIER, Plaintiff,
vs.
H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

TRANSCRIPT ON APPEAL.

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Filed Sep. 22 1910 At 4:55 o'clock p. m.
C. E. ATKINSON, *Clerk*,
W. N. JESSUP, *Deputy*.

Filed Oct. 13 1910.
C. S. REINHART, *Clerk*.

2 In the Superior Court of the State of Washington in and for the County of Spokane.

EDWIN L. GAUTHIER, Plaintiff,
vs.
H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Summons.

State of Washington to H. L. Needham, Peter Morrison, M. A. Saunders, and Minnie Saunders:

You, H. L. Needham, Peter Morrison, M. A. Saunders and Minnie Saunders, are hereby summoned to appear within twenty days, exclusive of the day of service of this summons upon you, *and* defendant- — the above entitled action in the court aforesaid and an-

swer the complaint of the plaintiff herein and serve a copy of your answer upon the persons whose names are subscribed hereto, at their postoffice address below given, and in case of your failure so to do, judgment will be rendered against you according to the demands of the complaint herein, which complaint will be filed with the clerk of said court, a true and correct copy of which is hereto attached and herewith served upon you.

Dated this 31st day of January, A. D. 1910.

SKUSE & MERRILL,
Suite 731 Peyton Bldg., Spokane, Wash., and
F. H. McDERMONT,
Suite 435 Peyton Bldg., Spokane, Wash.,
Attorneys for Plaintiff.

Filed March 2, 1910, at 2:15 p. m.
C. E. ATKINSON, *Clerk.*
C. D. WOODFILL, *Deputy.*

3 In the Superior Court of the State of Washington in and for the County of Spokane.

EDWIN L. GAUTHIER, Plaintiff,
vs.
H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Complaint.

The plaintiff above named complains of the defendants, and for cause of action alleges:

I.

That in the year 1877 the government of the United States caused to be surveyed townships twenty-four (24) and twenty-five (25), North, of Range forty-five (45) East Willamette Meridian, and the same were surveyed during said year by a surveyor employed for that purpose by the government of the United States under a contract entered into between the United States and said surveyor, and such surveyor in making said survey, among other instructions issued to him by the government of the United States in regard to his duties in making such survey, was instructed as follows: "You are also to meander in manner aforesaid all lakes and deep ponds of the area of twenty-five acres, and upwards; also navigable bayous; shallow ponds readily to be drained or likely to dry up are not to be meandered"; said instructions being a part of the manual of instructions relating to the public surveys, prepared at the General Land Office and bearing date February 22, 1855.

That notwithstanding such instructions, and in violation of his duty and of his contract in making the survey of said townships twenty-four and twenty-five north, of range forty-five (45) E. W. M.,

the said surveyor failed and neglected to include within the
4 survey of said townships all of the land therein, and failed to survey all of the lands within said townships, but did meander and failed to survey a portion of sections four (4) and five (5) in said township twenty-four and a portion of sections twenty (20) twenty-eight (28) twenty-nine (29) thirty-two (32) and thirty-three (33) in said township twenty-five (25) and in such survey wrongfully, erroneously and fraudulently designated the lands in said sections lying and being within the meandered lines as made by such survey, as a lake, and by so doing wrongfully, erroneously and fraudulently designated by means of such survey an area of land within such townships and within said sections in a contiguous body, containing approximately twelve hundred (1200) acres and lying and being within said meandered lines as aforesaid, as a lake, and wrongfully, erroneously and fraudulently failed and neglected to survey the same, or any part thereof, and no part thereof has since been surveyed by the government of the United States, and has never been alienated or disposed of by the government of the United States, and all of the said lands within the said meandered lines ever since have been and are now unsurveyed government lands belonging to the government of the United States as a part of its public domain and subject to, and open for settlement under the homestead laws of the United States.

II.

That the said lands lying and being within the meandered lines as made by the survey of said townships and said sections as aforesaid, were not at the time of such survey, are not now, *but* never have been a lake covered by a permanent body of water, and were at the time of such survey, and for a long time prior thereto, partially subject to overflow during the wet seasons of the year with none
5 or very little water thereon during the dry seasons of the year, the most of it being hay meadow upon which meadow grasses and other kind of grasses suitable for hay grow each season, with some swampy or marshy portions at or near the center, upon the most part of which said swampy or marshy portions cat-tails, tules, bull rushes, and other kinds of swamp vegetation grew each season, and all thereof likely to dry up and susceptible of being readily and easily drained, and at the present time and for several years last past, all of the lands within said meandered lines as made by said survey are good, agricultural lands susceptible of cultivation and susceptible of being used, occupied and farmed and grown to hay, grain and other crops the same as any other good agricultural land.

III.

That on the 30th day of October, 1909, this plaintiff, in good faith as a homestead settler, and for the purpose of thereafter making a homestead entry thereon and acquiring title thereto from the government of the United States under the homestead laws, made settlement upon that part and portion of the lands lying and being within the meandered lines as made and shown by the survey as

hereinbefore set forth, which, when surveyed, would be described as follows, to-wit:

The northeast quarter of the southwest quarter (N. E. ¼ S. W. ¼); part of the northwest quarter of the southeast quarter (N. W. ¼ S. E. ¼) and the southwest quarter of the southeast quarter (S. W. ¼ S. E. ¼) of section thirty three (33) township twenty-five (25) north of range forty-five (45) East Willamette Meridian, containing seventy-five (75) acres, more or less.

That at the time plaintiff settled upon said lands, as aforesaid, there was no one residing thereon, or upon any part or portion thereof, and no other person had prior thereto settled upon said lands, or any part or portion thereof, claiming same as a settler under the homestead laws of the United States, or any law
6 of the United States, and there was not at the time this plaintiff settled upon said lands, as aforesaid, any improvements thereon, or upon any part or portion thereof, made by any person claiming said lands as a settler under the homestead laws of the United States, or under any law of the United States, and this plaintiff was at the time of such settlement, and ever since has been, and still is, the only person occupying such lands, or any part or portion thereof, under the homestead laws of the United States, or under any law of the United States.

That at the time of making such settlement this plaintiff was over the age of twenty-one years, a native born citizen of the United States and not the proprietor of more than one hundred sixty acres (160) of land in any state or territory of the United States, and had never prior thereto made any entry of public lands under the homestead laws of the United States, and was in every way qualified to make settlement upon and entry of public lands and acquire title thereto from the United States under the homestead laws of the United States; that in making his said settlement upon said above described lands, as aforesaid, this plaintiff on the 30th day of October, 1909, erected upon said tract of land a frame house ten by twelve feet in size, with door, window and floor, suitable for habitation at any and all seasons of the year; that he then and there on said date furnished said house with all necessary cooking and household utensils and entered into possession and occupation of said house and established his residence therein, and in good faith continued to reside therein until required to remove therefrom by, through and on account of the acts of the defendants and others, as hereinafter set forth; that in making settlement upon, and residing upon said lands, as aforesaid, this plaintiff did so in good faith with the bona fide intention to continue to reside upon and occupy said lands and cultivate and improve the same, as required under the homestead laws of the United States, and this plaintiff settled upon said lands
7 and established his residence thereon, with full intention to occupy, improve and reside thereon, and comply with all the requirements of the homestead laws of the United States, and for no other purpose whatever.

That in order to comply with the requirements of the homestead laws of the United States and to acquire title to the lands so set-

tled upon by this plaintiff, as aforesaid, under said laws, it becomes and is necessary for this plaintiff to reside upon and cultivate such lands, and to have possession thereof for a period of five years, and unless this plaintiff can reside upon, cultivate and have possession of said lands for and during such period of time from and after his said settlement, this plaintiff cannot comply with the requirements of the homestead laws of the United States and sustain and maintain his rights to said lands and acquire title thereto from the government of the United States under the homestead laws of the United States.

IV.

That said defendants without any right so to do, have heretofore wrongfully and unlawfully occupied, cultivated and cropped the said lands settled upon by plaintiff, as aforesaid, and other lands within said meandered lines, and are now wrongfully, unlawfully and without any right so to do, attempting to use, occupy and control the same, and refuse to allow this plaintiff to use, occupy or control the lands so settled upon by plaintiff, as aforesaid; that immediately after this plaintiff made settlement upon said lands, as hereinbefore set forth, the defendants and others, for the wrongful and unlawful purpose of preventing this plaintiff from maintaining his settlement upon the lands so settled upon by him, as aforesaid, and to prevent this plaintiff from continuing and maintaining his residence upon the lands so settled upon by him, as aforesaid, and to prevent plaintiff from occupying, cultivating and improving the same, and to prevent this plaintiff from complying with the requirements of the homestead law, and to prevent this plaintiff from acquiring
8 title to the lands so settled upon by him as aforesaid, under the homestead laws of the United States, and for the purpose of enabling the defendants, and each of them, to wrongfully and unlawfully continue to occupy, crop, cultivate and control the lands so settled upon by plaintiff, as aforesaid, and other lands within said meandered lines, did conspire and confederate together, and in furtherance thereof, did, on or about the 5th day of November, 1909, wrongfully and unlawfully cause this plaintiff to be arrested for unlawful trespass, and did notify this plaintiff to remove, withdraw and remain away from said lands, and to remove all bulidings erected thereon by this plaintiff, and did threaten to prosecute and injure plaintiff unless plaintiff complied therewith and did remain and keep away from said lands and premises so settled upon by plaintiff, as aforesaid, and said defendants refuse to allow this plaintiff to go upon the lands so settled upon by plaintiff, as aforesaid, or upon any part thereof, and do prevent, and are preventing this plaintiff from continuing his settlement and residence upon the lands so settled upon by him, as aforesaid, and by reason thereof are —, and do prevent this plaintiff from complying with the requirements of the homestead laws in the matter of residence and cultivation upon the lands so settled upon by him, as aforesaid, and by reason thereof this plaintiff will be prevented from making the necessary legal proofs to the land department of his residence upon, and cultivation

and improvement of the lands so settled upon by him, and will thereby be prevented from acquiring title thereto from the government of the United States under the homestead laws, and thereby the defendants will continue to cultivate and crop said lands, and to derive a profit therefrom.

That by virtue of the settlement made upon said lands by this plaintiff and by virtue of the same being the unsurveyed public lands of the United States, this plaintiff is entitled to use, occupy and control the same and to the possession thereof, and said defendants by virtue of their acts aforesaid, are unlawfully withholding said lands from this plaintiff, as trespassers upon vacant public lands of the United States, subject to settlement under the homestead laws of the United States, and to the settlement of this plaintiff under said *said* laws, and said defendants, or either of them, have never made settlement upon said lands, or upon any part or portion thereof under the homestead laws, or any laws of the United States.

V.

That this plaintiff has not been absent from the lands so settled upon by him, as aforesaid, for a period of six months in any one year, and has not in any way abandoned said lands, or any part thereof, as a settler under the homestead laws of the United States.

Wherefore plaintiff prays the judgment and decree of this court:

First. That the plaintiff is entitled to the possession of the lands settled upon by him as set forth and described in his complaint herein, and to each and all thereof.

Second. That the defendants, and each and all of them, have no right to the possession of said lands, or to any part thereof.

Third. For plaintiff's costs and disbursements herein.

SKUSE & MORRILL,
Suite 731 *Peyton Bldg., Spokane, Washington, and*
F. H. McDERMONT,
Suite 435 *Peyton Bldg., Spokane, Washington,*
Attorneys for Plaintiff.

STATE OF WASHINGTON,
County of Spokane, ss:

Edwin L. Gauthier, being first duly sworn on oath deposes and says: that he is the plaintiff in the above entitled action that he has read the foregoing complaint and knows the contents thereof, and the same is true as he verily believes.

EDWIN L. GAUTHIER.

Subscribed and sworn to before me this 7th day of February, A. D. 1910.

JOHN J. SKUSE,
Notary Public in and for the State of Washington, Residing at Spokane, Washington.

Filed March 2, 1910, at 2:15 p. m.
C. E. ATKINSON, *Clerk.*
C. D. WOODFILL, *Deputy.*

In the Superior Court of the State of Washington in and for the County of Spokane.

EDWIN L. GAUTHIER, Plaintiff,

vs.

H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Amended Demurrer.

Come now the defendants above named and demur to the complaint of plaintiff herein on the following grounds, to-wit:

I.

That the court has no jurisdiction of the persons of the defendants, or of the subject-matter of the action.

II.

That there is a defect of parties defendant.

III.

That several causes of action have been improperly united.

IV.

That the complainant does not state facts sufficient to con-
11 stitute a cause of action.

V.

That the action has not been commenced within the time limited by law.

REESE H. VOORHEES,
MERRITT, OSWALD & MERRITT,
Attorneys for Defendants.

Filed August 22, 1910, at 9:30 A. M.
C. E. ATKINSON, *Clerk.*
W. B. SNYDER, *Deputy.*

Service of the within amended demurrer by a true copy thereof is hereby accepted at Spokane, Washington, this 18th day of March 1910, consent to amendment.

F. H. McDERMONT,
SKUSE & MORRILL,
Attorneys for Plaintiffs.

In the Superior Court of the State of Washington in and for the County of Spokane.

No. 30155.

EDWIN L. GAUTHIER, Plaintiff,
vs.
H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Order Sustaining Amended Demurrer to Complaint.

On the 9th day of April, 1910, this cause came on regularly for hearing by the court on amended demurrer of defendants to plaintiff's complaint, and after hearing said amended demurrer and the argument of counsel and the court having taken the matter under advisement, and the court being now fully advised in the premises, it is hereby

Ordered, that said amended demurrer be, and the same is hereby sustained. Plaintiff excepts and exception allowed.

Done in open court this 28th day of May 1910.

WM. A. HUNEKE, *Judge.*

O. K.
F. H. McD.

Filed May 28, 1910.
C. E. ATKINSON, *Clerk.*
J. G. LEGHORN, *Deputy.*

12 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 30155.

EDWIN L. GAUTHIER, Plaintiff,
vs.
H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Exception of Plaintiff to Order Sustaining Demurrer to the Complaint and Refusal to Plead Further.

Comes now the plaintiff and hereby excepts to the order of the court sustaining the demurrer to the complaint in the above entitled action, filed herein on the 28th day of May 1910.

The plaintiff declines to plead further in said action and elects to stand on his complaint as filed herein.

Dated May 28th, 1910.

SKUSE & MORRILL AND
F. H. McDERMONT,
Attorneys for Plaintiff.

Filed May 28, 1910, at 11:30 A. M.
C. E. ATKINSON, *Clerk.*
W. A. CUMMINGS, *Deputy.*

In the Superior Court of the State of Washington in and for the County of Spokane.

No. 30155.

EDWIN L. GAUTHIER, Plaintiff,

vs.

H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Judgment Dismissing Action.

13 This cause coming on regularly to be heard upon the demurrer of the defendants to the complaint of the plaintiff, and the court having heard Mr. Reese H. Voorhees, Counsel for the defendants and Messrs. Skuse & Morrill and F. H. McDermont, counsel for the plaintiff, and the court, being fully advised in the premises, sustained the defendants' demurrer to the plaintiff's complaint, and has made, and on the 28th day of May, 1910, has filed, its order so sustaining the said demurrer to the complaint.

And the plaintiff having duly excepted to said ruling and order sustaining said demurrer, and said exception being allowed; and the plaintiff having declined to plead further in said action; it is now, on motion of Mr. Reese H. Voorhees, counsel for defendants;

Ordered, adjudged and decreed, that the above entitled action be, and the same is hereby dismissed; defendants are dismissed without day and that the defendants have and recover of the plaintiff their legal costs.

Done by the court and dated this 28th day of May 1910.

W. A. HUNEKE, *Judge.*

O. K.
R. H. V.

Filed May 31, 1910, at 10:55 A. M.
C. E. ATKINSON, *Clerk.*
OTTO BLENNER, *Deputy.*

In the Superior Court of the State of Washington in and for the County of Spokane.

No. 30155.

EDWIN L. GAUTHIER, Plaintiff,

vs.

H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Notice of Appeal.

14 To the above named defendants and to Reese H. Voorhees and Merritt, Oswald & Merritt, your attorneys:

You, and each of you, are hereby notified that the above named plaintiff, Edwin L. Gauthier, appeals to the supreme court of the

state of Washington, from that certain ruling and order of the court, sustaining the demurrer of the defendants to the complaint of the plaintiff, made and entered in the above entitled action on the 28th day of May 1910, and from the whole thereof; also from that certain judgment made on the 28th day of May 1910, and entered on the 31st day of May 1910, dismissing plaintiff's action, with cost and from the whole thereof.

Dated this 7th day of June A. D. 1910.

SKUSE & MORRILL,
Suite 731 *Peyton Bldg., Spokane, Wash.*,
F. H. McDERMONT,
Suite 435 *Peyton Bldg., Spokane, Wash.*,
Attorneys for Plaintiff and Appellant.

Due service of the foregoing Notice of Appeal, is hereby admitted this 9th day of June, A. D. 1910.

MERRITT, OSWALD & MERRITT,
REESE H. VOORHEES,
Attorneys for Defendants.

Filed June 9, 1910, at 10:45 A. M.
C. E. ATKINSON, *Clerk.*
M. M. RICHARDSON, *Deputy.*

In the Superior Court of the State of Washington in and for Spokane County.

No. 30155.

EDWIN L. GAUTHIER, Plaintiff,
vs.
H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Appeal Bond.

15 Know all men by these presents, that we, Edwin L. Gauthier, the plaintiff above named, as principal, and the Fidelity and Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland, and authorized to transact the business of surety in the state of Washington, as surety, are held and firmly bound unto H. L. Needham, Peter Morrison, M. A. Saunders and Minnie Saunders, the defendants above named, in the just and full sum of two hundred dollars ($200.00) for which sum, well and truly to be paid, we bind ourselves, our and each of our heirs, executors and administrators successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of June, 1910.

The condition of this obligation is such, that whereas, the above named defendants on the 31st day of May A. D. 1910, in the above

entitled action and court, recovered judgment against the plaintiff above named of dismissal of the above entitled action and for costs.

And whereas, the above named principal has heretofore given due and proper notice that he appeals from said decisions and judgment of said superior court to the supreme court of the State of Washington.

Now, therefore, if the said principal, Edwin L. Gauthier, shall pay to H. L. Needham, Peter Morrison, M. A. Saunders and Minnie Saunders, the defendants above named, all costs and damages that may be awarded against him on the appeal, or on the dismissal thereof, and shall satisfy and perform the judgment or order appealed from, in case it shall be affirmed, and any judgment or order which the said supreme court may render or make, or order to be rendered or made by said superior court, then this obligation to be void; otherwise to remain in full force and effect.

EDWIN L. GAUTHIER, [SEAL.]
By SKUSE & MORRILL, [SEAL.]
His Attorneys.
[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By E. H. BELDEN, *Its Attorney in Fact.*

Attest:
W. S. McCREA,
General Agent.

Filed June 9, 1910 at 10:45 o'clock A. M.
C. E. ATKINSON, *Clerk,*
By M. M. RICHARDSON, *Deputy.*

16 In the Superior Court of the State of Washington in and for the County of Spokane.

No. 30155.

EDWIN L. GAUTHIER, Plaintiff,
vs.
H. L. NEEDHAM, PETER MORRISON, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Certificate.

STATE OF WASHINGTON,
County of Spokane, ss:

I, C. E. Atkinson, clerk of the superior court of the State of Washington, for the County of Spokane, do hereby certify;

That the above and foregoing is a full, true and correct transcript of so much of the records and files in the above entitled case now remaining on file and of record in my office, as I have been directed by the appellant to transmit to the supreme court of the state of Washington.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, this 22 day of September, 1910.

[SEAL.] C. E. ATKINSON, *Clerk*,
By W. W. JESSUP, *Deputy*.

Indorsed: In the Superior Court of the State of Washington, in and for the County of Spokane. Edwin L. Gauthier, Plaintiff, vs. H. L. Needham, Peter Morrison, M. A. Saunders, and Minnie Saunders, Defendants. Transcript on Appeal. Skuse & Morrill, 731 Peyton Bldg., Spokane, Wash.; F. H. McDermont, 435 Peyton Bldg., Spokane, Wash., Attorneys for Plaintiff.

17 (No. 9189. Department One. Filed March 25, 1911.)

EDWIN L. GAUTHIER, Appellant,
v.
PETER MORRISON, L. A. NEEDHAM, M. A. SAUNDERS, and MINNIE SAUNDERS, Respondents.

The plaintiff brought this action, seeking to have the court adjudge that he is entitled to possession of the land described in the complaint, and that the defendants have no right to possession thereof. The defendants demurred to the complaint, upon the ground that the court had no jurisdiction of the subject-matter, and that the complaint did not state facts sufficient to constitute a cause of action, and upon other grounds. The trial court sustained this demurrer, and the plaintiff electing to stand upon the allegations of his complaint, the action was dismissed. Plaintiff appeals.

The complaint alleged:

"That in the year 1877, the government of the United States caused to be surveyed townships twenty-four (24) and twenty-five (25) north of range forty-five (45) East Willamette Meridian, and the same were surveyed during said year by a surveyor employed for that purpose by the government of the United States under a contract entered into between the United States and said surveyor, and such surveyor in making said survey, among other instructions issued to him by the government of the United States in regard to his duties in making such survey, was instructed as follows: 'You are also to meander in manner aforesaid all lakes and deep ponds of the area of twenty-five acres, and upwards; also navigable bayous; shallow ponds readily to be drained or likely to dry up are not to be meandered;' said instructions being a part of the manual of instructions relating to the public surveys, prepared at the general land office and bearing date February 22, 1875; that notwithstanding such instructions and in violation of his duty and of his contract in making the survey of said townships twenty-four and twenty five, north, of range forty-five (45) E. W. M., the said surveyor failed and neglected to include within the survey of said townships all of the land therein, and failed to survey all of the lands within said townships, but did meander and failed

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to survey a portion of sections four (4) and five (5) in said township twenty-four and a portion of sections twenty (20), twenty-eight (28), twenty-nine (29), thirty-two (32), and thirty-three (33), in said township twenty-five, and in such survey wrongfully, erroneously and fraudulently designated the lands in said sections, lying and being within the meandered lines as made by such survey, as a lake, and by so doing wrongfully, erroneously and fraudulently designated by means of such survey an area of land within such townships in a contiguous body, containing approximately twelve hundred (1,200) acres and lying and being within
19 said meandered lines as aforesaid, as a lake, and wrongfully, erroneously and fraudulently failed and neglected to survey the same, or any part thereof, and no part thereof has since been surveyed by the government of the United States, and has never been alienated or disposed of by the government of the United States, and all of the said lands within the said meandered lines ever since have been and are now unsurveyed government lands belonging to the government of the United States as a part of its public domain and subject to, and open for, settlement under the homestead laws of the United States; that the said lands lying and being within the meandered lines as made by the survey of said townships and said sections, as aforesaid, were not at the time of such survey *and* not now, and never have been a lake covered by a permanent body of water, and were at the time of such survey, and for a long time prior thereto, partially subject to overflow during the wet seasons of the year, with none or little water thereon during the dry season of the year, the most of it hay meadow, upon which meadow grasses and other kind of grasses suitable for hay grew each season, with some swampy or marshy portions at or near the center, upon the most part of which said swampy or marshy portions cat-tails, tules, bullrushes and other kinds of swamp vegetation grew each season, and all thereof likely to dry up and susceptible of being readily and easily drained, and at the present time, and for several years last past, all of the lands within said meander lines as made by said survey, are good agricultural lands susceptible of cultivation and susceptible of being used, occupied and farmed and grown to hay, grain and other crops the same as any other good agricultural land; that on the 30th day of October, 1909, this plaintiff, in good faith as a homestead settler, and for the purpose
20 of thereafter making a homestead entry thereon and acquiring title thereto from the government of the United States under the homestead laws, made settlement upon that part and portion of the lands lying and being within the meandered lines as made and shown by the survey, as hereinbefore set forth, which, when surveyed, would be described as follows, to-wit: The northeast quarter of the southwest quarter (N. E. ¼ S. W. ¼); part of the northwest quarter of the southeast quarter (N. W. ¼ S. E. ¼) and the southwest quarter of the southeast quarter (S. W. ¼ S. E. ¼) of Section thirty-three (33), township twenty-five (25), north of range forty-five (45), East Willamette Meridian, containing seventy-five (75) acres more or less."

The complaint then alleges that the plaintiff is a qualified entryman under the homestead laws of the United States, and that at the time he settled upon the said land no one resided on any part thereof, but that defendants have heretofore wrongfully occupied and cultivated the said lands, and are now wrongfully attempting to occupy and control the same, and have unlawfully prevented the plaintiff from occupying the lands.

It is apparent that this is a possessory action, and while the complaint alleges a right in the plaintiff, this allegation is but a conclusion. Before the plaintiff may be adjudged to have the right of possession, it must appear that the land sought is subject to the right which the plaintiff demands. He can obtain no right to the land or its possession by reason of the fact that the defendants have no right or are trespassers. As we said in George v. Columbia & Puget Sound R. Co., 38 Wash. 480, 483,

"Whatever may be the technical law on this subject, it is unimportant here for the reason that, in this kind of an action, the plaintiff, if he prevails at all, must prevail upon the strength
21 of his own title, and not upon the weakness of that of his adversary. The basis of this complaint is a possessory right."

Appellant's right to possession is necessarily based upon the character of the land; that is, if the land is vacant, unsurveyed public land, subject to settlement and possession by the plaintiff under the homestead laws of the United States, then he has shown a right, otherwise, he has none. The complaint recites that, in the year 1877, the government of the United States caused townships 24 and 25, north, range 45, to be surveyed by a surveyor employed for that purpose; that such surveyor did meander the land in dispute, and wrongfully and fraudulently designated such lands as a lake; that said lands within the meandered lines were not, and never have been, a lake covered by a permanent body of water, but were swampy or marshy at or near the center, and were susceptible of being readily and easily drained, and are good agricultural land susceptible of being occupied, cultivated, and farmed. It is at once apparent from these allegations that the government, through its land department, has classified these lands as a lake, and therefore the land is not subject to settlement under the homestead laws; and that the object of this action is to have the state courts declare that the government, through fraud of its agent, holds the land as water, when in fact it is land which is unsurveyed. The government is not a party to this action, and of course such judgment, if finally made in this case, would not be binding upon the government. It has been held, since early times, that the exclusive control of the public lands rests in the interior department, and remains there until patent has issued and title has passed from the government; and that there is no jurisdiction in the courts to control
22 either the public lands or the action of the government in connection therewith, until patent has issued and the land ceases to be public lands. Until that time, all questions affecting the status of government land rest exclusively in the government.

The question then is, have the state courts jurisdiction to determine questions involving the character or disposition of land by the United States, or the action of the interior department in regard thereto?

Section 453, U. S. Revised Statutes, provides:

"The commissioner of the general land office shall perform, under the direction of the secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government."

Section 2118, Id., provides:

"The secretary of the interior shall take all the necessary measures for the completion of the surveys in the general surveying-districts for which surveyor-generals have been, and may be, appointed."

Section 2219 provides:

"In all cases where, as provided in the preceding section, the field-notes, maps, records, and other papers pertaining to land-titles in any state are turned over to the authorities of such state, the same authority, powers, and duties in relation to the survey, resurvey, or subdivision of lands therein, and all matters and things connected therewith, as previously exercised by the surveyor-general whose district included such state, shall be vested in, and devolve upon, the commissioner of the general land-office."

And section 2395 provides:

23 "Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs, and mill-seats which come to his knowledge; all water-courses over which the line he runs may pass; and also the quality of the lands."

The act of Congress of March 31, 1909 (Supp. to Fed. Stats. Ann. 563), provides:

"That the secretary of the interior may, in this discretion, cause to be made as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided: That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: Provided, further, That not to exceed five per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby."

It is not difficult, upon the foregoing legislation, to reach the conclusion that the courts of a state cannot undo what the secretary of the interior has done in the course of his administration of the public lands, or decree rights of private parties in the land which rest upon the necessity of the secretary of the interior undoing whatever he has already done and doing something different. In

Cragin v. Powell, 128 U. S. 691, the supreme court of the United States said:

"That the power to make and correct surveys of the public lands belongs to the political department of the government and
24 that, whilst the lands are subject to the supervision of the general land office, the decisions of that bureau in all such cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law is settled by such a mass of decisions of this court that its mere statement is sufficient."

A large number of decisions are therein cited to support this statement, and the court then proceeds:

"The reason of this rule, as stated by Justice Catron in the case of Haydel v. Dufresne, is that great confusion and litigation would ensue if the judicial tribunals, were permitted to interfere and over throw the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do."

This declaration of lack of jurisdiction in the courts prior to the issuance of patent has been many times affirmed by the Supreme Court of the United States: Stoneroad v. Stoneroad, 158 U. S. 240; Russell v. Maxwell Land Grant Co., 158 U. S. 253; Knight v. United States Land Association, 142 U. S. 161; Kirwan v. Murphy, 189 U. S. 35.

In Kirwan v. Murphy, supra, the court said:

"The land department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved. The department has held that the land lying between the alleged meander line and the
25 lake, some 1,200 acres, is government land, and has ordered it to be surveyed. Re Burns, 20 Land Dec. 28, 295. 23 Land Dec. 430. The execution of that order was restrained by the preliminary injunction herein, and that has been made perpetual by the decree. We are confronted on the threshhold with two objections to the maintenance of this bill; namely, the want of jurisdiction in equity, and the want of jurisdiction thus to interfere with executive administration. * * * The administration of the public lands is vested in the land department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority, and in violation of the statute. Whiteside v. United States, 93 U. S. 247; Moffat v. United States, 112 U. S. 24; Hume v. United States, 132 U. S. 406. The Courts can neither correct nor make surveys. The power to do so is reposed in the political department of the government, and the land department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the

courts before it has taken final action. Brown v. Hitchcock, 173 U. S. 473."

In Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, the Supreme Court said:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of congress will pass the fee. * * * Sometimes a certification of a list of lands to the
26 grantee is declared to be operative to transfer such title, * * * but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent * * *; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost. * * * And, again, on page 181 is this language: 'The secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the government, which is a party in interest in every case involving the surveying and disposal of the public lands.' * * * This jurisdiction extends to the ordering of new surveys whenever in the judgment of the department there has been error or fraud in those already made. Cragin v. Powell, 128 U. S. 691. In Tubbs v. Wilhoit, 138 U. S. 134, 143, the court quoted with approval this passage from a letter of the secretary of the interior; 'There can be no doubt but that under the act of July 4, 1836, reorganizing the general land office, the commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general.' And in New Orleans v. Paine, 147 U. S. 261, the question was presented as to the power of the department to order a new survey, and on page 206 the rule was thus stated: 'If the department was not satisfied with this survey, there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees
27 of a court open to review upon the final hearing.' So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swamp land, and, therefore, passing under the act of 1850 to the state of Michigan, it was within the power of the land department, at any time prior to the issue of a patent, of its own motion, to order a resurvey and correct by that any mistakes in the prior survey."

In Brown v. Hitchcock, 173 U. S. 473, the Supreme Court of the United States said:

"In this case the record disclosed no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United

States. Until the legal title to public lands passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department. In United States v. Schurz, 102 U. S. 378, 396, which was an application for a mandamus to compel delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the government conveyed to the citizen. This court, has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet in fieri, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.' * * * The dissent announced by the chief justice only emphasizes the proposition laid down in the opinion as heretofore quoted, that so long as the legal title remains in the government, all questions of right should be solved by appeal to the Land department and not to the courts."

In Oregon v. Hitchcock, 202 U. S. 60, the same court said:

28 "Again, it must be noticed that the legal title to all these tracts of land is still in the government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the land department that the lands referred to were swamp or overflowed on March 12, 1860. Under those circumstances it is not a province of the courts to interfere with the land department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the government, inquiry as to equitable rights comes within the cognizance of the land department. Courts may not anticipate its action, or take upon themselves the administration of the land grants of the United States."

The same rule has been followed by this court in Columbia Canal Co. v. Benham, 47 Wash. 249.

We are clear, therefore, that the state courts have no jurisdiction of this case under the facts alleged, and that the remedy of the appellant, if he has any, is in the land department of the United States government. The complaint showing that the land is held as water by the government, it is not subject to homestead entry. The complaint is therefore insufficient to show a right of possession in the plaintiff, and the judgment must be affirmed.

MOUNT, *J.*

We concur: Dunbar, C. J., Parker, J., Fullerton, J., and Gose, J.

29 *Authentication of Record.*

SUPREME COURT,
State of Washington, ss:

I, C. S. Reinhart, clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 28, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of

Edwin L. Gauthier, plaintiff, vs. Peter Morrison, N. L. Needham, M. A. Saunders, and Minnie Saunders, defendants, and also of the opinion of this court rendered herein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Olympia, Washington, this December 4th 1911.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk Supreme Court of Washington.

30 In the Supreme Court of the State of Washington, Friday, April 28, 1911.

No. 9189.

EDWIN L. GAUTHIER, Appellant,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS, and MINNIE SAUNDERS, Respondents.

Judgment.

This cause having been heretofore submitted to the court upon the transcript of the record of the superior court of Spokane county, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now on this 28th day of April, A. D. 1911, on motion of Voorhees & Canfield, Esquire-, of counsel for respondent considered, adjudged and decreed that the judgment of the said superior court be and the same is hereby affirmed with costs; and that the said Peter Morrison, N. L. Needham, M. A. Saunders and Minnie Saunders, have and recover of and from the said Edward L. Gauthier and from Fidelity & Deposit Company, of Maryland, surety, the costs of this action taxed and allowed at sixty-six 00/100 dollars, and that execution issue therefor, and it is further ordered that this cause be remitted to the said superior court for further proceedings in accordance herewith.

31 In the Supreme Court of the State of Washington.

No. 9189.

EDWIN L. GAUTHIER, Plaintiff,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the supreme court of the State of Washington in rendering judgment against him in the above entitled case, the plaintiff herein prays a writ of error,

from the said decision and judgment to the United States supre court, and an order fixing the amount of a supersedeas bond.

And the said Edwin L. Gauthier assigns the following errors in t records and proceedings in said case:

The supreme court of the state of Washington erred in holdi and deciding, from the allegations set forth in the complaint, th plaintiff did not acquire a right of possession, or any interest in a to the land therein described, under and by virtue of section 3, the act of Congress, approved May 14, 1880, (21 St. at L. 140) reason of the settlement thereon by him established and the i provements thereon by him made on the 30th day of October, 190 and in denying to plaintiff, by its decision, the rights accorded him under said act as a legally qualified homestead settler, he havi shown in the complaint his qualifications as such, as specified section 2289 of the United States revised statutes, and also erred not finding and deciding that defendants were holding said la from plaintiff in violation of the act of Congress approved Febru 25th, 1880.

These said errors are more particularly set forth as follows:

The supreme court of the state of Washington erred in holdi and deciding:

32 First. In finding from the allegations of said complai that the land therein described is not vacant unsurveyed pu lic land, and not subject to settlement and possession by plaint under the homestead laws of the United States, as one legally qua fied under said laws to make such settlement, and to enjoy the p session of said land by virtue of the settlement and improvemer thereon made by him on the 30th day of October, 1909, in good fa with the intent and purpose of complying with the requirements the homestead laws of the United States, and acquiring title there under such laws.

Second. In deciding from the allegations of the complaint th said land has been by the land department classified as a lake, a hence by reason of such so called classification, same was not subj to settlement by plaintiff on the 30th day of October, 1909, under t homestead laws of the United States.

Third. In not finding and deciding from the allegations of t complaint that plaintiff was on the 30th day of October 1909, p sessed of all the qualifications of a homestead entryman, as specifi and set forth in section 2289 of the United States Revised Statut and was therefore on said date entitled to make settlement upon t land described, and by virtue thereof entitled to a decree of the co sustaining his possession thereto, and his settlement thereon.

Fourth. In denying to plaintiff by said decision the right to set upon, and the possession of, the land described in the complain such right being guaranteed to plaintiff under the provisions of t homestead laws of the United States, and the decisions of the Unit States supreme court.

Fifth. In not finding and deciding that defendants were holdi and occupying said land as against plaintiff, in violation of the of Congress approved February 25th, 1885. (23 St. at L. 321.)

For which errors the plaintiff, Edwin L. Gauthier, prays that the said judgment of the supreme court of the state of Washington, dated March 25th, 1911, be reversed and a judgment rendered in favor of plaintiff and for costs.

W. C. JONES,
JOHN J. SKUSE,
FRED B. MORRILL,
F. H. McDERMONT,
Attorneys for Edwin L. Gauthier.

33 STATE OF WASHINGTON,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by Edwin L. Gauthier to Peter Morrison, N. L. Needham, M. A. Saunders and Minnie Saunders, in the sum of one thousand ($1000.00) dollars.
Dated Oct. 31, 1911.

R. O. DUNBAR,
Chief Justice Supreme Court of Washington.

Indorsed: 9189. Filed Oct. 31 1911. C. S. Reinhart, Clerk.

34 Copy.

In the Supreme Court of the State of Washington.

No. 9189.

EDWIN L. GAUTHIER, Plaintiff in Error,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS, and MINNIE SAUNDERS, Defendants in Error.

Bond.

Know all men by these presents, That we, Edwin L. Gauthier, as principal and the Fidelity & Deposit Company of Maryland, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington, as surety, are held and firmly bound unto Peter Morrison, N. L. Needham, M. A. Saunders, and Minnie Saunders, in the sum of One thousand ($1000.00) Dollars, to be paid to the said Peter Morrison, N. L. Needham, M. A. Saunders, and Minnie Saunders, to which payment, well and truly to be made, we bind ourselves jointly and severally by these presents.

Sealed with our seals, and dated this 12th day of October 1911.

Whereas, the above-named plaintiff in error seeks to prosecute his writ of error to the U. S. Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Washington.

Now, therefore, the condition of this obligation is such, that if the

above-named plaintiff in error shall prosecute his said writ of error to effect, and answer all costs that may be adjudged not exceeding said sum of One Thousand Dollars if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

35 EDWIN L. GAUTHIER.
FIDELITY & DEPOSIT COMPANY
OF MARYLAND,
By A. H. BELDEN,
Its Attorney in Fact.

Attest:
[SEAL.] W. S. McCREA,
General Agent.

Bond approved.
Dated Oct. 31, 1911.

R. O. DUNBAR,
Chief Justice Supreme Court of Washington.

36 [Endorsed:] In the Supreme Court of the State of Washington. Edwin L. Gauthier, Plaintiff in error, vs. Peter Morrison, N. L. Needham, N. A. Saunders and Minnie Saunders, Defendants in error. Bond. W. C. Jones, John J. Skuse, Fred B. Morrill, F. H. McDermont, attorneys for plaintiff in error.

37 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Edwin L. Gauthier, and Peter Morrison, N. L. Needham, M. A. Saunders and Minnie Saunders, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Edwin L. Gauthier, as by his complaint appears. We being willing that error, if any hath

been, should be duly corrected, and full and speedy justice
38 done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, *that* said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the Twenty-Second day of Nov., 1911.

[Seal of the United States Circuit Court, Eastern District of Washington.]

FRANK C. NASH,
Clerk Circuit Court United States, Eastern District of Washington, Eastern Division.

Allowed,
R. O. DUNBAR,
Chief Justice, Supreme Court of Washington.

[Endorsed:] 9189. Filed Nov. 22, 1911. C. S. Reinhart, Clerk.

39 *Certificate of Lodgment.*

SUPREME COURT,
State of Washington, ss:

I, C. S. Reinhart, clerk of the said court, do hereby certify that there was lodged with me as such clerk on Oct. 31, 1911, *1911,* in the matter of Edwin L. Gauthier, versus Peter Morrison, N. L. Needham, M. A. Saunders and Minnie Saunders;

1. The original bond of which a copy is here set forth.
2. Five copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office, on Dec. 3, 1911.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Olympia, Washington, this December 4th, 1911.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk Supreme Court of Washington.

40 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Peter Morrison, N. L. Needham, M. A. Saunders, and Minnie Saunders, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C.,

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Supreme Court of the United States

OCTOBER TERM, 1913

EDWIN L. GAUTHIER,
Plaintiff in Error,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS and MINNIE SAUNDERS,
Defendants in Error.

No. 157

ARGUMENT.

The question presented by the Motion to Dismiss is whether the decision of a federal question is made necessary in the determination of the rights of the parties to the action. The contention of plaintiff in error in the courts below and in this court, is that he has been denied a right and privilege guaranteed to him under the statutes of the United States, and is asking the courts to reinstate and protect him in such right and privilege. It is alleged in the complaint:

First. That plaintiff in error is legally qualified to make settlement and entry under the homestead laws of the United States, and sets forth the facts constituting his qualifications as such.

Second. That the land in question is unsurveyed,

unalienated, vacant public land of the United States, and subject to settlement under the federal homestead laws, and the facts showing it to be such are fully set forth.

Third. That as a qualified homestead settler, he made settlement in good faith, and established his residence upon the land in question for the purpose of acquiring title thereto under the federal homestead laws, and sets forth the date and acts constituting such settlement and residence.

Fourth. That he is the only person claiming the land involved under the homestead laws, or any other law of the United States.

Fifth. That defendants in error are wrongfully and unlawfully preventing him from continuing his settlement and residence upon the land, and preventing him from occupying same and complying with the requirements of the federal homestead laws, and from acquiring title thereto under said laws; and,

Sixth. He prays the judgment of the Court decreeing that he is entitled to the possession of the lands so settled upon by him, and upon which he had established his residence, and that defendants in error have no right to the possession of any part thereof.

Our contention is that the question and issues raised by the complaint and demurrer thereto can-

not be correctly decided except through a construction of Section 3, Article IV. of the Constitution of the United States and the Acts of Congress thereunder relating to the disposal of the public domain, for the purpose of ascertaining:

First. Whether the land involved has ever been disposed of by Congress under the provision of the Constitution, or whether it is unsurveyed, unappropriated, vacant public land, subject to settlement by plaintiff in error.

Second. What rights and privileges, if any, he acquired under federal laws, to such land, by virtue of his settlement and residence thereon, as set forth in his complaint; and,

Third. Has he acquired any right or privilege in and to such land under the federal laws, which the Courts can and should protect and enforce?

This not only requires the interpretation of the settlement and homestead laws as enacted by Congress, but the Act of February 25th, 1885 (23 St. at L. 321), as well; all of which presents federal questions.

Still another question presented, is whether the land department had the power to designate the lands within the meandered lines as water, and thereby withdraw from settlement under the federal land laws a part of the public domain. This is one of the questions upon which the State Supreme

Court hinged its decision. In passing upon this question, the Court says:

> "Appellant's right to possession is necessarily based upon the character of the land; that is, if the land is vacant, unsurveyed public land, subject to settlement and possession by the plaintiff under the homestead laws of the United States, then he has shown a right, otherwise, he has none. The complaint recites that, in the year 1877, the government of the United States caused townships 24 and 25, north, range 45, to be surveyed by a surveyor employed for that purpose; that such surveyor did meander the land in dispute, and wrongfully and fraudulently designated such lands as a lake; that said lands within the meandered lines were not, and never have been, a lake covered by a permanent body of water, but were swampy or marshy at or near the center, and were susceptible of being readily drained, and are good agricultural land susceptible of being occupied, cultivated, and farmed. It is at once apparent from these allegations that the government, through its land department, has classified these lands as a lake, and therefore the land is not subject to settlement under the homestead laws; * * * The complaint showing that the land is held as water by the government, it is not subject to homestead entry. The complaint is therefore insufficient to show a right of possession in the plaintiff, and the judgment must be affirmed."

(Trans., pages 14-18.)

This question goes directly to the power of the land department. The question, therefore, is

whether Congress has under Section 3, Article IV. of the Constitution, vested such power in the land department. If Congress has not done so, such lands are still a part of the public domain, and as such subject to settlement by plaintiff in error, and presents another federal question.

It is true the State Supreme Court held that it was without jurisdiction, *not upon a point of practice,* but because under the facts as alleged in the complaint, the remedy of plaintiff in error, if any, "is in the Land Department of the United States Government." The Court did not refuse to hear the case, or dismiss same for lack of jurisdiction, but passed upon the rights of plaintiff in error and the federal questions involved, and found that the land was not vacant, unappropriated public land subject to settlement and residence by plaintiff in error, under the federal land laws, and therefore he did not acquire any rights thereto by reason of his settlement and residence thereon, which the Courts could protect.

The disposition of the public domain under the provisions of Section 3, Article IV of the Constitution, being exclusively within the jurisdiction of Congress, who alone has the power to declare how, and in what manner, it may be disposed of, no declaration of any officer of the departments can operate to dispose of any part of the public domain, except by authority of Congress. There-

fore, even allowing that the land department has designated the lands within the meandered lines in question as water, such designation would not operate to withdraw same from settlement under the federal homestead laws, as found and decided by the State Supreme Court in deciding this case, unless Congress has expressly provided that such designation operates as a withdrawal. If, however, the lands being meandered and designated as water at the time of the survey of the surrounding lands, operated as a withdrawal of all the lands within the meandered lines from settlement under the homestead settlement laws, then and in that event, the plaintiff in error would not acquire any rights or privileges by virtue of his settlement and residence; but if, upon the other hand, the meandering and designation of said lands as water did not operate as a withdrawal thereof from the public domain and from such settlement and residence, then plaintiff, by virtue of his settlement and residence, acquired a vested right thereto, and the right and privilege to continue to occupy, reside upon, and cultivate same, under the provisions of the federal homestead laws. This is not a question of fact, but a question of law to be determined from the Acts of Congress relating to the disposal of the public domain, and, so far as we are able to ascertain from a careful search of the authorities, has

never been directly passed upon and decided by this Court.

In the complaint it is alleged, and stands admitted, that the lands within the meandered lines are not, and never have been, covered with water, but are good agricultural lands, susceptible of cultivation, the same as any other good agricultural lands, and by reason thereof it was contended by plaintiff in error, in the Courts below, that such lands are, and always have been, vacant, unappropriated public lands, subject to settlement under the federal homestead laws, and that by reason of his settlement thereon, he has acquired a vested right therein, and a right to the possession thereof. This right the state Courts denied the plaintiff in error, and, still asserting that right, he is now before this Court.

Speaking upon the rights of a settler upon public lands under the homestead laws, Justice Miller, in United States vs. Waddell *et al,* 112 U. S. (28 Law Ed. 673), says:

> "The right assailed, obstructed, and its exercise prevented or intended to be prevented as set out in this petition, is very clearly a right wholly dependent upon the Act of Congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an Act of Congress. The Constitution of the United States, by Article IV, Section 3, in express terms vests in Congress the power to

dispose of and make all needful rules and regulations respecting the territory or other property of the United States. One of its regulations, the one under consideration, authorizes a class of persons, of whom Lindsay is one, to settle upon its land, and, on payment of an inconsiderable sum of money and the written declaration of intention to make it a homestead, he is authorized to reside there. By building a house and making other improvements on it, and residing there for five years consecutively, which, under the statute and under that alone, he has a right to do, and paying the fees to the officer necessary to its issue, he acquires a patent or title in fee to the land.

But his title is dependent on continued residence of himself and family. By the original entry he acquires the inchoate but well-defined right to the land and its possession, which can only be perfected by continued residence, possession and cultivation for five years. His right to continue this residence for five years for that purpose is dependent upon the Act of Congress. His right to the patent, after this is done, rests exclusively on the same foundation.

The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the State and by its Court. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the Act of Congress and, according to its rules, perfect his incipient title.

Whenever the acts complained of are of a character to prevent this or throw obstruction

in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute."

Plaintiff in error is not seeking to have the survey declared null and void, or changed or altered in any manner, as contended by counsel for defendants in error; neither is plaintiff in error asking the Court to declare that he is entitled to the land in question as a right, now to be settled and determined by the Court in this case. That is a question to be determined by the Land Department at the proper time. We simply assert that the land within the meandered lines has never been surveyed; that it has never been segregated from the public domain; that it is subject to settlement under the homestead laws; that plaintiff in error, as a qualified homestead entryman, under said laws, had a legal right to make settlement and establish his residence thereon; that he has done so, and by virtue thereof he has acquired "a right wholly dependent upon the Act of Congress concerning the settlement and sale of public lands of the United States," and all he is now seeking through the Courts is protection in that right, in order that he may comply with the requirements of the homestead laws, to the end that

he may in due course properly present his claims to the land department; show his compliance with the federal land laws, pay to the government the required fees and commissions, and obtain a patent conveying title. The complaint shows that unless he is protected in his rights as a homestead settler, he cannot continue his settlement and residence upon the land, and will therefore be forever prevented from complying with the provisions and requirements of the federal laws as to settlement and residence, and in consequence thereof will not be able to go before the land department showing a compliance with the laws, and be in position to claim at the proper time his patent and title from the government.

The State Supreme Court, in its opinion, said that plaintiff in error's "right to possession is necessarily based upon the character of the land; that is, if the land is vacant, unsurveyed public land, subject to settlement and possession by plaintiff under the homestead laws of the United States, then he has shown a right, otherwise he has none," and then decided that the lands within the mendered lines were not vacant, unsurveyed public lands, and were "not subject to settlement under the homestead laws." (Trans., p. 14.) Thereby directly passing upon a federal question, and not only that, but deciding that question adversely to plaintiff in error, and depriving him of a right and

privilege acquired directly by and through an Act of Congress.

The case at bar is very similar to the case of French-Glenn Live Stock Co. vs. Springer, 185 U. S. 47 (46 L. Ed. 800), except to our mind it appears more clearly that a federal question is presented in the instant case than in the case cited.

In that case Justice Shiras, in delivering the opinion of the Court, says:

> "As the case went off in the Oregon courts on this question of fact, it may be questionable whether any matter of Federal law is left open for our revision. However, as the plaintiff in error contended, in the courts below, and in this court, that a proper construction of the survey and patents gave riparian rights covering the land in dispute, and that it was not competent to overcome such rights by evidence affecting the legal import of the plats and patents, we think a Federal question is thus presented."

Security Land & Explo. Co. vs. Burns, 193 U. S. 168 (48 Ed. L. 662), is also in point upon this question.

If plaintiff in error cannot have his rights to possession passed upon, determined and settled by the Courts, he is without a remedy. The land department cannot issue any process or writ that will aid or protect him either in his possession of the land or in his settlement and residence thereon. He might by

force of arms, like "ye knights of ye olden times," maintain his possession, but that mode of maintaining ones rights is not of this day and generation, especially when the rights and privileges sought and claimed flow from an Act of Congress.

We therefore submit that the motion to dismiss should be denied, and the case heard and decided upon its merits. For further discussion and citations upon this question, and contentions made by plaintiff in error, we respectfully refer to the brief of plaintiff in error now on file with the Clerk of this Court.

Respectfully submitted,

W. C. JONES,
FRED B. MORRILL,
L. F. CHESTER,
JOHN J. SKUSE,
Attorneys for Plaintiff in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

EDWIN L. GAUTHIER,
Plaintiff in Error,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS and MINNIE SAUNDERS,
Defendants in Error.

No. 506.

Error to the Supreme Court of the State of Washington.

MOTION BY DEFENDANTS IN ERROR TO DISMISS THE WRIT OF ERROR

Now come the defendants in error in the above entitled cause, by their attorney, and move the court that plaintiff in error's writ of error herein be dismissed, upon the following grounds, to-wit:

(a) That no federal question was decided by the court below, nor was the decision of a federal question necessary in rendering the judgment entered by that court.

(b) That there is no federal question involved in this case.

(c) That this court is without jurisdiction.

REESE H. VOORHEES,
Attorney for Defendants in Error.

To Edwin L. Gauthier, plaintiff in error, and to W. C. Jones, Fred B. Morrill, L. F. Chester and John J. Skuse, your attorneys:

You, and each of you, will please take notice that the foregoing motion will be submitted to the above entitled court on Monday, the 22nd day of December, 1913, upon the incoming of court.

REESE H. VOORHEES,
Attorney for Defendants in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1912.

EDWIN L. GAUTHIER,
Plaintiff in Error,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS and MINNIE SAUNDERS,
Defendants in Error.
No. 506.

ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF DEFENDANTS IN ERROR ON MOTION TO DISMISS WRIT OF ERROR.

STATEMENT.

The defendants in error demurred to the complaint of plaintiff in error on the ground that the court below did not have jurisdiction, and on other grounds, and the court below sustained the demurrer on the ground that the court below did not have jurisdiction. (Trans., pp. 7, 12-18.)

The complaint alleges that the land in controversy is vacant public land, that patent has never issued therefor, that title is in the United States, and that the land was, in 1877, by the United States officials fraudulently and wrongfully surveyed and classified as a lake, and that there was not *enough* water on the land at the time of the survey to constitute a lake, and that said lands have now been for several years past agricultural lands, and the court below was asked by plaintiff in error to declare this survey and classification made by the United States to be null and void and that the land is subject to and open for settlement under the homestead laws of the United States. It is further alleged that plaintiff in error went upon said land to acquire the same under the homestead laws and began a compliance therewith, and that his arrest was procured by defendants in error for unlawful trespass, and that defendants in error prevented, and do prevent, the plaintiff in error from continuing upon and maintaining possession of said land. The complaint further shows that defendants in error were in possession of said lands prior to plaintiff in error's settlement thereupon. (Trans. pp. 2-6.)

The writ of error can only be maintained here under Section 709 of the U. S.Revised Statutes.

Capital National Bank v. Cadiz First Nat. Bank, 172 U. S. 425.

The validity of a treaty or federal statute is not drawn in question, nor the validity of an authority exercised under the United States, and there was no decision against their validity; and there is not drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and there was no decision in favor of their validity. The plaintiff in error does claim that he has the right, under the homestead laws, to settle upon and acquire the land, and we presume he relies upon the third clause of Section 709 of the U. S. Revised Statutes as giving this court jurisdiction. (4 Fed. Stats. Anno. 467.)

The opinion of the state court is before this court. (Trans., pp. 12-18.) That court discussed and decided but one question, to-wit, the question of its own jurisdiction. In its opinion the state court says (Trans., pp. 14, 18):

"Appellant's right to possession is necessarily based upon the character of the land; that is, if the land is vacant, unsurveyed public land, subject to settlement and possession by the plaintiff under the homestead laws of the United States, then he has shown a right, otherwise, he has none. The complaint recites that, in the year 1877, the government of the United States caused Townships 24 and 25, North, Range 45, to be surveyed by a surveyor employed for that purpose; that such surveyor did meander the land in dispute, and wrongfully and fraudulently designated such land as a

lake; that said lands within the meandered lines were not, and never have been, a lake covered by a permanent body of water, but were swampy or marshy at or near the center, and were susceptible of being readily and easily drained, and are good agricultural land susceptible of being occupied, cultivated and farmed. It is at once apparent from these allegations that the government, through its land department, has classified these lands as a lake, and therefore the land is not subject to settlement under the homestead laws; and that the object of this action is to have the state courts declare that the government, through fraud of its agent, holds the land as water, when in fact it is land which is unsurveyed. The government is not a party to this action, and of course such judgment, if finally made in this case, would not be binding upon the government. It has been held, since early times, that the exclusive control of the public lands rests in the interior department, and remains there until patent has issued and title has passed from the government; and that there is no jurisdiction in the courts to control either the public lands or the action of the government in connection therewith, until patent has issued and the land ceases to be public land. Until that time, all questions affecting the status of government land rest exclusively in the government. The question then is, have the state courts jurisdiction to determine questions involving the character or disposition of land by the United States, or the action of the interior department in regard thereto? * * * We are clear, therefore, that the state courts have no jurisdiction of this case under the facts alleged, and that the remedy of the appellant, if he has any, is in the land department of the United States government."

BRIEF.

It will be observed that the court below refused to decide any question, either of fact or law, with regard to the merits of the case, by expressly refusing to take jurisdiction of it. The rule of this court is that, in order to give it jurisdiction of a writ of error from a state court, the federal question relied upon must not only be clearly raised in the case and clearly relied upon in the court below, but must have been expressly decided by the court below, or necessarily decided in reaching its judgment; and it is further the rule of this court that, where the opinion of the court below is brought to this court and shows that the court below refused to entertain jurisdiction, the writ of error will be dismissed for lack of a federal question, and this is true even though there *might* have arisen a federal question and it *might* have been decided had the court entertained jurisdiction.

Semple v. Hager, 4 Wallace, 431;
Smith v. Adsit, 16 Wallace, 185;
Jack v. Helena, 115 U. S. 288;
People of State of California v. Halliday, 159 U. S. 415;
Cox v. Texas, 202 U. S. 446;
De Lamar's Nev. Gold Min. Co. v. Nesbitt, 177 U. S. 523;
Endowment & Benevolent Assn. of Kansas v. State of Kansas, 120 U. S. 103;
Blackburn v. Portland Gold Min. Co., 175 U. S. 571.

Even though the court below had entertained jurisdiction of this suit and decided it upon the issues raised by the complaint, yet there is no federal question raised upon the complaint and, it is submitted, this court would still be without jurisdiction. The plaintiff in error relies upon a right claimed under the homestead laws and the federal constitution, but no dispute arises over the construction of the homestead laws or the construction of the constitution. Whether the plaintiff in error can recover upon his complaint depends entirely on questions of fact. The questions of fact are: (a) Did the surveyor, employed and directed by the United States, make the survey of its lands in 1877 wrongfully and fraudulently and wrongfully and fraudulently meander the land in question as a lake and classify it as a lake—was there fraud in the survey? (b) Was there, in 1877, when the United States made its survey, *enough* water on this land to constitute a lake? (c) Is the land agricultural land of the *character* making it subject to homestead entry? Whether a lake or not a lake in 1877 is the ultimate fact to be decided either by a court or a jury, and these matters of fact must be primarily established before the homestead laws can operate, or be considered as having any application to the case. As was said by this court, where the claim was made to public land, under Section 2339 of the Revised Statutes of the United States,

and the case hinged on the question of fact as to priority of possession:

"The question who had acquired this priority of possession was not a federal question, but a pure question of fact, upon which the decision of the state court was conclusive. No construction was put upon the statute; no question arose under it; but a preliminary question was to be decided before the statute became material, and that was whether defendants were first in possession of the land. Even if priority of possession had been shown, it would still have been necessary to prove that defendants' right to the use of the water was recognized and acknowledged by local customs, laws and decisions, all of which were questions of state law. * * * The jurisdiction of this court in this class of cases does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of, a federal question."

Telluride Power & Transmission Co. v. Rio Grande Western Ry. Co., 175 U. S. 639;
Telluride Power & Transmission Co. v. Rio Grande W. R. Co., 187 U. S. 569;
Myrtle v. Nevada C. & O. Ry. Co., 137 Fed. 193.

Finally, this court has repeatedly ruled that there is no jurisdiction in the courts, this court and other federal courts as well as state courts, of the questions affecting public land raised upon plaintiff in error's complaint—that the courts have no jurisdiction either to control the public land or the action of the government in connection therewith, before patent shall have issued and until the land shall have ceased to be public land.

Cragin v. Fowell, 128 U. S. 691.
United States v. Schurtz, 102 U. S. 378;
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Knight v. United Land Ass'n., 142 U. S. 161;
Kirwan v. Murphy, 189 U. S. 35;
Humbird v. Avery, 159 U. S. 480;
Michigan Land & Lumber Co. v. Rust, 168 U. S. 589;
Brown v. Hitchcock, 173 U. S. 473;
Oregon v. Hitchcock, 202 U. S. 60.

We submit that this court is without jurisdiction and the writ of error must be dismissed.

Respectfully submitted,

REESE H. VOORHEES,
Attorney for Defendants in Error.

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Supreme Court of the United States

OCTOBER TERM, 1913

EDWIN L. GAUTHIER,
Plaintiff in Error,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS and MINNIE SAUNDERS,
Respondents.

No. 506

STATEMENT.

A demurrer to the complaint was sustained in the Trial Court, and judgment of dismissal entered. The question here presented is whether the complaint sets forth a cause of action.

The complaint alleges that plaintiff in error is a qualified entryman under the homestead laws of the United States, and the facts showing such qualifications. That on the 30th day of October, 1909, he, in good faith, as a homestead settler and for the purpose of making a homestead entry thereon and acquiring title thereto from the government under the homestead laws, settled and established his residence upon certain unsurveyed government lands, as described in the complaint, comprising seventy-five acres. That at the time he made such settlement he erected upon the land a frame house, ten by twelve feet in size, with door, window and floor, suitable for a habitation at any and

all seasons of the year and furnished the same with all necessary cooking and household utensils, and entered into the possession of said land and established his residence thereon and continued to reside upon said land and in this house thereon, in good faith until required to remove therefrom, by, through and on account of the acts of the respondents and others, as set forth in the complaint; that in making his settlement and establishing his residence upon said land, he did so for the sole and only purpose of maintaining and continuing his residence thereon and complying with the requirements of the homestead law and acquiring title to said land from the United States, under the homestead laws. It is also alleged that after plaintiff in error settled and established his residence upon said land, respondents and others, for the wrongful and unlawful purpose of preventing plaintiff in error from continuing his settlement and residence upon said land and to prevent him from occupying, improving and cultivating the same and to prevent him from complying with the requirements of the homestead law, and acquiring title to said land, under the homestead law, and for the purpose of enabling respondents to wrongfully and unlawfully occupy, crop, cultivate and control the lands so occupied by plaintiff in error, and other lands, did conspire and confederate together, and in furtherance thereof by acts set forth in the complaint did remove plaintiff in error from the land and prevent him from continuing his settlement and residence thereon, and do prevent him from occupying said land and complying with the requirements of the homestead law and acquiring title thereto from the United States. That at the time plaintiff in error settled and established his residence upon said land, there was no one residing thereon or on any part thereof, and there were no improvements

thereon made by any person claiming said land as a settler under the homestead law, or any law of the United States, and at the time of his said settlement he was, ever since has been, and still is, the only person occupying and claiming said land under the homestead law or any law of the United States, and that respondents, or either of them, have never made settlement upon said land, or upon any part thereof, under the homestead laws, or any laws of the United States.

It is further alleged that the townships in which said land is located were by the government caused to be surveyed in 1877, under a contract entered into between the United States and a surveyor employed for that purpose and, among other instructions issued to him by the government, he was instructed in regard to his duties in making such survey as follows: "You are also to meander in manner aforesaid all lakes and deep ponds of the area of twenty-five acres, and upwards; also navigable bayous; shallow ponds readily to be drained or likely to dry up are not to be meandered." Said instructions being a part of the manual of instructions relating to the public surveys prepared at the General Land Office and bearing date of February 22, 1855.

That in violation of his contract and said instructions said surveyor in making the survey of said townships failed and neglected to include in the survey thereof all of the lands therein and failed to survey all the lands within said townships, and in making such survey wrongfully, erroneously and fraudulently, meandered and designated a contiguous body of land within said townships containing approximately 1200 acres as a lake, and failed and neglected to survey the same or any

part thereof, and no part thereof has since been alienated or disposed of by the government, and all of said lands ever since have been and now are unsurveyed government lands belonging to the United States as a part of its public domain and subject to, and open for settlement under the homestead laws, of the United States. That said lands so meandered and not surveyed, were not at the time of such survey, are not now and never have been a lake covered by a permanent body of water, but were at the time of such survey and for a long time prior thereto partially subject to overflow during the wet seasons of the year, with none or very little water during the dry seasons, the most of it being hay meadow, upon which meadow grasses and other kinds of grasses suitable for hay grew each season, with some swampy, marshy portions in the center, and all thereof likely to dry up, and susceptible of being readily and easily drained, and at the present time and for several years last past all of said unsurveyed lands are good agricultural lands susceptible of being used, occupied and farmed, and grown to hay, grain and other crops the same as any other agricultural lands. The complaint shows that the lands settled upon by plaintiff in error are within said meandered lines and a part of said unsurveyed lands. Plaintiff in error prays the judgment of the Court for the possession of the lands settled upon by him as described in the complaint, in order to enable him to comply with the requirements of the homestead laws, and that respondents have no right to the possession thereof.

Record, pp. 2, 3, 4, 5 and 6.

Respondents demurred to the complaint upon the grounds:

First: That the Court has no jurisdiction of the defendants, or the subject matter of the action.

Second: That there is a defect of parties defendant.

Third: That several causes of action have been improperly united.

Fourth: That the complaint does not state facts sufficient to constitute a cause of action.

Fifth: That the action has not been commenced within the time limited by law. (Record, p. 7.)

After full argument by counsel for the respective parties the demurrer was sustained by the Court, and plaintiff in error refusing to further plead and electing to stand upon his complaint, judgment of dismissal was on the 28th day of May, 1910, entered. (Record, p. 9.)

From which ruling and order of the Court sustaining the demurrer and from the judgment of dismissal, appeal was taken to the Supreme Court of the State of Washington; which Court on the 25th day of March, 1911, filed its decision sustaining the judgment of the lower Court.

Record, pp. 12, 13, 14, 15, 16, 17 and 18.

The cause is now before this Court upon a Writ of Error.

SPECIFICATION OF ERRORS.

I.

The Supreme Court of the State of Washington erred in finding from the allegations of the complaint that the land therein described is not vacant unsurveyed public land, and not subject to settlement and possession by plaintiff in error under the homestead laws of the United States, as one legally qualified under said laws to make such settlement, and to enjoy the possession of said land by virtue of the settlement and improvements made thereon by him on the 30th day of October, 1909, in good faith with the intent and purpose of complying with the requirements of the homestead laws of the United States, and acquiring title thereto under such laws.

II.

In deciding from the allegations of the complaint that said land has been by the land department classified as a lake, and hence by reason of such so-called classification, same was not subject to settlement by plaintiff in error on the 30th day of October, 1909, under the homestead laws of the United States.

III.

In not finding and deciding from the allegations of the complaint that plaintiff in error was on the 30th day of October, 1909, possessed of all the qualifications of a homestead entryman, as specified and set forth in Section 2289 of the United States Revised Statutes, and

was therefore on said date entitled to a decree of the Court sustaining his possession thereto, and his settlement thereon.

IV.

In denying the plaintiff in error by said decision the right to settle upon, and the possession of, the land described in the complaint; such right being guaranteed to him under the provisions of the homestead laws of the United States. (Sec. 2289, Rev. St.)

V.

In not finding and deciding that from the allegations of the complaint it appears that respondents were holding and occupying said land as against plaintiff in error, in violation of the Act of Congress approved February 25th, 1885. (23 St. at L. 321.)

VI.

In finding and deciding that the complaint did not set forth facts sufficient to constitute a cause of action in favor of plaintiff in error and against respondents.

VII.

In holding that the Courts have no jurisdiction of the case under the facts alleged in the complaint.

VIII.

In holding that, it being shown by the complaint, that the land is held as water by the government, it is not subject to homestead entry by plaintiff in error.

IX.

In not finding and deciding that under the acts of Congress, the Statutes of the State of Washington, and

the decisions of the Federal and State Courts, the allegations of the complaint set forth a full and complete cause of action in favor of the plaintiff in error and against respondents.

ARGUMENT.

The question before the Court is whether, admitting that all of the material allegations are true, the complaint states a cause of action.

If it shows that the land is vacant, unsurveyed public land; that plaintiff in error is a legally qualified homestead applicant therefor, and has made a *bona fide* settlement thereon for the purpose, in good faith, of acquiring title thereto under the public land laws of the United States, and that respondents have no rights therein, or are trespassers thereon, then and in that event, we contend that the complaint states a complete cause of action.

It seems to us that the proper method of arriving at a correct solution of these questions is to, first, determine the legal status of the land; second, the legal status of the plaintiff in error; and, third, the legal status of the respondents, as shown by the complaint.

LEGAL STATUS OF THE LAND.

The allegations of the complaint conclusively show that the land settled upon by plaintiff in error, is vacant, government land, subject to settlement under the home-

stead laws of the United States. Under the law and decisions, the fact that the lands were at the time of the survey of the townships, meandered, not surveyed, and designated as a lake, did not change the legal status of said land, or in any way take the title from the government and vest the title in any one else.

Under Section 3, Article IV, of the Constitution of the United States, whereby Congress is vested with full power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," no lands belonging to the United States can be disposed of, except by, through, or under an act of Congress, and the fact that in making the survey of the township in which these lands lie, such lands were meandered, such act on the part of the surveyor cannot in any way operate as a disposal of said lands to any one, or divest the government of the United States of such lands.

No appropriation of public land can be made for any purpose but by authority of an act of Congress.

United States vs. Fitzgerald, 15 Pet. 407.
United States vs. Gratiat, 14 Pet. 526.
Bagnell vs. Broderick, 13 Pet. 436.
United States vs Tichenor, 12 Fed. 415.
Frazer vs. Spokane County, 29 Wash. 278.

Hence, no officer of the government has the power or authority to dispose of public lands without authority of Congress, and he cannot waive the conditions and limitations provided by Congress.

Deffeback vs. Hawke, 115 U. S. 392.
Davis vs. Weibbold, 139 U. S. 507.
Taylor vs. Brown, 40 N W. 525.

In the latter case a patent had been issued to a Sioux Indian who had abandoned his tribal relations, and who had earned the land under an act of Congress (18 St. at L. 420, Sec. 15), which made the land inalienable for a period of five years. The patent did not show that he was an Indian and did not contain any limitation on alienation.

The Supreme Court of the Territory of Dakota held that the act of the Land Department in issuing the patent without words of limitation could not affect the limitation prescribed by Congress, and that purchasers from the Indian as patentee, were chargeable with knowledge of the limitations imposed upon his title by said act of Congress.

This case was appealed to the Supreme Court of the United States and the judgment affirmed.

Taylor vs. Brown, 147 U. S. 640.

The decision of the Dakota Territorial Court is cited with approval in *Eells vs. Ross,* 12 C. C. A. 205 (64 Fed. 417).

Nothing passes title to public lands but a patent, the sole exception being a grant by an act of Congress.

United States vs. Fitzgerald, 15 Pet. 407.

Wilcox vs. Jackson etc., 13 Pet. 498.

In the case of *United States vs. Fitzgerald, supra,* Justice McKinley, in rendering the opinion of the Court upon this question, says:

> "No appropriation of public land can be made for any purpose but by authority of Congress. By the third section of the fourth article of the Consti-

tution of the United States, power is given to Congress to dispose of and make all needful rules and regulations respecting the territory, or other property of the United States."

On February 22nd, 1855, the Land Department issued a manual of instructions for the guidance of surveyors or deputy surveyors in surveying government lands. Among the instructions contained in this manual was the following:

> "3. You are also to meander in manner aforesaid, all lakes and deep ponds of the area of twenty-five acres and upwards; also navigable bayous; shallow ponds, readily to be drained or likely to dry up, are not to be meandered."

1 *Lester,* 714.

This manual was by the act of May 30th, 1862 (Sec. 2399, Rev. St. U. S.), approved by Congress and provided that said manual of instructions should be deemed a part of every surveying contract. Said section reads as follows:

> "The printed manual of instructions relating to the public surveys, prepared at the General Land Office, and bearing date February twenty-second, eighteen hundred fifty-five, the instructions of the Commissioner of the General Land Office, and the special instructions of the Surveyor General, when not in conflict with such printed manual or the instructions of the Commissioner, shall be taken and deemed to be a part of every contract for surveying public lands."

The complaint in this case shows that the contract for the survey of the township within which the land described in the complaint is situated was under said instructions and under said act.

While the surveyor meandered said lands and designated same as a lake, such meandered lines are not conclusive as to the existence of a lake within such meandered lines, and if there never was a permanent body of water within said lines as alleged in the complaint herein, or if one did not exist at the time of the survey, such meandered lines are not conclusive as to the government of the United States, or any one else.

Niles vs. Cedar Point Club, 175 U. S. 300 (44 L. Ed. 171).
French-Glenn Live Stock Co. vs. Springer, 185 U. S. 47 (46 L. Ed. 800).
Horne vs. Smith, 159 U. S. 40 (40 L. Ed. 68).
Security Land and Explo. Co. vs. Burns, 193 U. S. 168 (48 L. Ed. 662).
Kean vs. Calumet Canal & Imp. Co., 190 U. S. 458 (47 L. Ed. 1134).
Carr vs. Moore (Iowa), 93 N. W. 52.
Schlosser vs. Hemphill (Iowa), 90 N. W. 842.
Lammers vs. Nissen, 4 Neb. 255.
Bissell vs. Fletcher, 19 Neb. 725.
Grant vs. Hemphill et al., 59 N. W. 263.
French-Glenn Live Stock Co. vs. Springer (Ore.), 58 Pac. 102.
Chapman & Dewey Land Co. vs. Bigelow, 206 U. S. 41 (51 L. Ed. 953).

In the case of *Niles vs. Cedar Point Club, supra,* Justice Brewer, in rendering the opinion of the Court, says:

> "Of course, if the fractional sections patented to Margaret Bailey did not border on some body of water there were no riparian rights, and if the conclusion of the trial Court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh—whether it became more or less subject to overflow—would not alter the fact that the rights of Margaret Bailey, the patentee, were

limited to the very lands which were conveyed to her, and for which she paid, and do not extend over the meander line into the territory north.

But it is urged that the fact that a meandered line was run amounts to a determination of the land department that the surveyed fractional sections bordered upon a body of water, navigable or non-navigable, and that, therefore, the purchaser of these fractional sections was entitled to riparian rights; and this in face of the express declaration of the field notes and plat, that that which was lying beyond the surveyed section was 'flag marsh,' or 'impassable marsh and water.' But there is no such magic in a meandered line. All that can be said of it is that it is an irregular line which bounds a body of land, and beyond that boundary there may be found forest or prairie, land or water, government or Indian reservation."

The rule of construction in the case of a grant from the sovereign is quite different from that which governs private grants.

Charles River Bridge vs. Warren Bridge, 11 Pet. 420 (9 L. Ed. 773).
Martin vs. Waddell, 16 Pet 367 (10 L. Ed. 997).
Central Trans. Co. vs. Pullman Palace Car Co., 139 U. S. 24 (35 L Ed. 55).
The Rebeckah, 1 C. Rob. 227.

In the latter case what we believe to be the correct rule upon this subject is laid down by Sir William Scott, as follows:

"All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being con-

ferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away."

Under this rule the Courts should strictly construe against the grantee the amount of land conveyed by a patent from the United States.

To show that from the very beginning it has been the practice of the Land Department to survey lake beds that have become dry, or where the surveyor has failed to follow the instructions contained in the Manual, the Commissioner of the General Land Office, in his report for 1866, page 121, in referring to the rule prevailing concerning the meandering of lakes and ponds where subsequently to such meandering they were reported dry, says, "They were surveyed and brought into the market. In all these instances the United States has but exercised the ordinary right of proprietorship."

On July 13th, 1874, the Commissioner of the General Land Office issued the following circular of instructions relating to the survey of the beds of meandered lakes and ponds:

"Department of the Interior, General Land Office,
Washington, D. C., July 13, 1874.

As inquiries arise in regard to the survey of the beds of meandered lakes or other similar bodies of water in districts where the office of Surveyor-General has been discontinued, the following is communicated as defining the conditions under which such lake beds are regarded as surveyable, and as giving the proper mode of proceeding to have the same surveyed and to obtain title thereto:

The beds of lakes (not navigable), sloughs and

ponds over which the lines of public surveys were not extended at the date of the original survey, but which from the presence of water at the date of such survey were meandered, are held to be the property of the United States; and whenever, by evaporation or the operation of any other cause, natural or artificial, the waters of such lake, slough or pond have so permanently receded or dried up as to leave within the unsurveyed area dry land fit, in ordinary seasons, for agricultural purposes, such dry land is subject to survey and sale under the general laws regulating the disposal of the public domain.

Such surveys will be ordered and, upon approval, disposition proceeded with in the following cases:

1st: Where the waters have so far permanently receded or disappeared as to permit, during the ordinary surveying season (not on the ice), the actual extension of the lines of the survey, and the establishment and marking of corners in the manner required by law, over the whole area of the bed of such former lake.

2nd. Where the waters have not generally disappeared, but where they have so far permanently receded as to leave a margin of dry land fit for cultivation between the original meandered lines and the remaining waters, of sufficient area to admit of the survey and of the establishment of at least three of the corners of a quarter-section.

3rd. The Commissioner of the General Land Office will consider the question of ordering a survey of margins not admitting the laying off of one hundred and sixty acres, but not less than forty acres."

Copps' Public Land Laws, 1st Ed., p. 765.

To show that Congress has never questioned the propositions that lands within meandered lines were a part of the public domain, and subject to disposal by Congress, we call attention to different acts of Congress relating to such lands. Thus, after the sale of border lots abutting on the meander lines of a marsh and the Little Calumet River, Congress, by Act of July 1st, 1870 (16 Stat. at L. 187, Chap. 199), provided for the survey and sale of the lands within the meandered lines.

So, after the patenting to the State of Indiana of the fractional lots abutting on Beaver Lake, Congress, by Act of January 11th, 1873 (17 Stat. at L. 409, Chap. 32), granted the bed of the lake to the State.

Again Congress by Act of February 19, 1874 (18 St. at L. 16, Chap. 30), granted the bed of a meandered lake situate in Holt County, Missouri, to the County, with a reservation, however, that the County should make title to all persons who might have settled thereon under the homestead and pre-emption laws.

Again, Congress passed an Act on December 21st, 1874 (18 St. at L. 293, Chap. 5), which reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the bed of the marsh or pond in sections fourteen, twenty-three and twenty-six, in township sixteen north, of range twenty east of the fourth principal meridian in the County of Sheboygan, in the State of Wisconsin, as shall or may be reclaimed by draining the water from the same, shall be owned and held, so far as any rights or interests of the United States are concerned, by the owners of the lands abutting upon said marsh or pond, and draining the same to the center or thread thereof, and divided among the

several owners adjoining and abutting said marsh or pond, according to the rules of law, upon payment by said adjoining owners into the treasury of the United States of $1.25 per acre for the amount of land that has been or may be so reclaimed."

The very latest decisions of the Secretary of the Interior upon this question hold that lands within meandered lines where such surveys were not correct, or where waters originally within those lines have disappeared should be surveyed and the lands brought under the operation of the laws governing the disposal of public lands.

Arkansas Sunk Lands (Dec. 12th, 1908), 37 L. D. 345.
Arkansas Sunk Lands on Review (Feb. 27th, 1909), 37 L. D. 462.

In this case the lands involved were originally surveyed at various dates between 1845 and 1849. The lands, or at least a portion of them, were settled upon and such settlers urged that the lands be surveyed and disposed of under the public land laws. On the other hand, the Chapman & Dewey Land Co., claiming to be riparian owners, and the St. Francis Levee District, claiming under an Act of the State Legislature, protested against the survey, contending that the United States had no interest in the lands within the meandered lines. It also appeared that one Williams had purchased from the St. Francis Levee Board a portion of the lands, paying therefor the sum of $150,000.00, and claimed that such purchase was made upon the repeated assurances of the Department that the United States did not own any title to the lands, but that same was owned by the St. Francis Levee Board under the Swamp Land Act of 1850, and particularly to the fact

that on November 17th, 1902, the Department declined to order a survey of the lands, holding that the integrity of the original surveys had not been impeached.

After considering all of the facts, the Secretary of the Interior, in rendering his opinion on the motion for review, says:

> "The disposition of the public domain lies within the exclusive jurisdiction of Congress, who alone has power to declare how the United States may be divested of its title. From this it follows that unless the title has passed out of the United States by reason of the operation of some law of Congress, or by the authorized act of some official done in accordance with the directions of some act of Congress, it still remains in the government, and no mere declaration or expression of opinion by any executive officer of any of the departments could operate to divest such title.
>
> It is not believed that there is any such thing as estoppel against the United States in the absence of express statutory provision to that effect."

The Secretary therefore held that the lands were public lands of the United States subject to disposal under the public land laws, and directed that a survey thereof be made.

It is elementary that land covered by water within the public domain of the United States is as much a part thereof as the dry land.

> *Ill. Central Ry. Co. vs. Chicago,* 176 U. S. 646 (44 L. Ed.) 622).

Upon this question Justice Brown, in rendering the opinion for the Court, says:

> "We do not question the general principle that the word 'lands' includes everything which the

land carries or which stands upon it, whether it be natural timber, artificial structures, or water, and that an ordinary grant of land by metes and bounds carries all pools and ponds, non-navigable rivers, and waters of every description by which such lands, or any portion of them, may be submerged; since, as was said by the Court in *Queen v. Leeds & L. Canal Nav. Co.*, 7 Ad. & El. 671, 685, 'lands are not the less land for being covered with water.'"

At this time we believe it proper to inquire into and ascertain what has been the practice of the United States in the disposal of such lands; that is, lands within the public domain that were covered with water. While there has been some confusion in the Courts upon the question, it will be found that it has been the settled policy of the United States from the beginning of our present form of government to concede all navigable waters, as well as the land under them, as belonging to the states, to be held in trust for the people subject only to the power of Congress to regulate commerce thereon. Many cases in the Supreme Court of the United States can be cited upon this proposition, but we do not deem it necessary to go further than quote from the opinion of Justice White in the case of *Kean vs. Calumet Canal & Imp. Co.*, 190 U. S. 485 (see 47 L. Ed., page 1145, and cases cited), as follows:

"Doubtless, as the result of the provisions treating navigable waters as public highways, and from a consideration of the nature and extent of the powers vested by the constitution in the Federal Government and those reserved to the States, and by a consideration of the doctrine of public and private waters known to the common law, it was early decided, and has been repeatedly reiterated, that the navigable waters and the land under them belonged to the States—as well the new as the old—

> in virtue of their sovereignty, to be held in trust for their people, subject to the power of Congress to regulate commerce. And, in harmony with the principle just stated, it has been decided that such navigable waters and the land under them in the public domain of the United States within the territories, while subject to be disposed of by Congress, under the trust for public use, were yet held by the United States to be transmitted to the new States to be formed, and which should, when endowed with statehood, possess them with the same rights and powers as the original states. A list of the cases in which this doctrine is stated is appended in the margin."

As necessary consequence of the ownership, in trust, by the States of all navigable water therein, as well as the land under them, it came to be decided that rights in such navigable water, and the lands under them, were to be determined by the Federal Courts, solely with reference to the law of the State in which such waters were situate.

> *St. Anthony Falls W. P. Co. vs. St. Paul Water Course,* 168 U. S. 349 (42 L. Ed. 497).
> *Shively vs. Bawlby,* 152 U. S. 1 (38 L. Ed. 331).
> *Barney vs. Keokuk,* 94 U. S. 324 (24 L. Ed. 224).

Under Article XVII of the State Constitution of the State of Washington the State has asserted its ownership to the beds and shores of all navigable waters within the State. Hence it is for this State to dispose of lands under navigable water within the State as it deems best for the interest of the public.

So, in the State of Washington, lands under navigable waters belong to the State, while lands under non-navigable waters belong to the United States. Hence it follows, as a matter of course, that lands under navigable waters are to be disposed of by the State, while

lands under non-navigable waters can only be disposed of under an Act of Congress, under Section 3, Article IV, of the Constitution of the United States, whereby Congress is vested with power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

We therefore find that under the Constitution of the United States, the laws of Congress and the decisions of the Courts, these lands within the meandered lines and not surveyed are public lands of the United States, and as such subject to settlement under the homestead laws of the United States. That such is and has been their legal status, as shown from the complaint, cannot be gainsaid.

LEGAL STATUS OF PLAINTIFF IN ERROR.

As a legally qualified homestead entryman, plaintiff in error is entitled to the protection of the Courts in his efforts to maintain a good faith settlement and residence upon the land.

Under Section 2264, Rev. St. U. S., a person who makes settlement upon public lands with intent to purchase same under the pre-emption law, is allowed thirty days within which to make his pre-emption filing, and under Section 2266, Rev. St. U. S., such settler, when the land is unsurveyed, is allowed three months within which to make such pre-emption filing after the survey and plats have been filed in the local land office, and Section 3 of the Act of May 14, 1880 (6 Fed. St. An., 301), provides as follows:

> "That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption law."

When the lands sought to be entered are unsurveyed, the homestead settler initiates his claim and right to the land by making a settlement thereon, and by such settlement the claimant acquires a valuable and valid vested right under the laws of the United States which were enacted for the benefit of the actual settler.

> *Moss vs. Dowman,* 176 U. S. 413 (44 L. Sd. 526).
> *Shepley vs. Cowan,* 91 U. S. 330 (23 L. Ed. 424).
> *Anderson vs. Carkins,* 135 U. S. 483 (34 L. Ed. 272).
> *Bohall vs. Dilla,* 114 U. S. 47 (29 L. Ed. 661).

In the case of *Moss vs. Dowman, supra,* Justice Brewer, in rendering the opinion of the Court, says:

> "Pre-emption and homestead laws were enacted for the benefit of the actual settler, and to that end they should be construed and administered. The plaintiff herein contends that this tract of land was withdrawn for five years from settlement by mere successive entries in the land office, and could be kept thus withdrawn in the future indefinitely, while speculators wait such time as it becomes convenient to them to perfect title by settlement and occupation. The proposition thus made is so offensive to the spirit and purpose of the land laws of the United States that unless the statutes made

such a result necessary from a true construction of their language it ought to be rejected. Again and again has this Court affirmed the proposition that the settler is the beneficiary of the pre-emption and homestead laws of the United States."

In order to acquire that right, however, the settler must be qualified to enter the land so settled upon by him under the homestead law, and must make his settlement in good faith with the *bona fide* intention of residing upon the land and eventually acquiring title thereto from the government under that law. All of which is fully shown by the complaint in this case, and in order to protect and maintain the rights so acquired by such settlement, the settler must reside upon the land and cultivate and improve the same for a period of five years, and by so doing he becomes entitled to a patent or title in fee to the land from the government. The right to that patent, outside of his qualifications as a homestead claimant under the law, rests upon three requirements being complied with: First, that he makes settlement on the land with the *bona fide* intention to reside upon, cultivate and acquire title thereto under the homestead law; Second, that he does reside thereon in good faith and make same his home and place of residence; Third, that he cultivate and improve the same.

We therefore find that under the laws of Congress and the decisions of the Courts, the legal status of the plaintiff in error as shown by the complaint is that of a homestead settler claiimng a vested right by virtue of his settlement on public lands of the United States.

That the Courts have jurisdiction and the power to protect his rights is without question; for it cannot be

that the Courts are powerless under such conditions, and that a settler cannot seek and receive protection in his rights through Courts of Justice.

Such protection has always been given by the Courts:

Hebeisen vs. Hatchell, 69 Pac. 888.
LaChapelle vs. Babb, 62 Fed. 545, 69 Fed. 482.
Colwell vs. Smith, 1 Wash. Ter. 92.
Ward vs. Moorey, Ibid, 104.
Zimmerman vs. McCurdy, 106 N. W. 125.
Wood vs. Murray, 52 N. W. 356.
Hadley vs. Ulrich, 33 Pac. 705.
Peckham vs. Faught, 37 Pac. 1085.
Commanger vs. Dicks, 28 Pac. 864.
Fulmele vs. Camp, 39 Pac. 407.
Matthews vs. O'Brien, 88 N. W. 12.
Woodsides vs. Rickey, 1 Ore. 108.

That settlers upon unsurveyed public lands should be protected in their rights is recognized by the law of the State of Washington.

Section 942, R. & B. Ann. Codes, reads as follows:

> "That any person now occupying and settled upon, or who may hereafter occupy or settle upon any of the unsurveyed public lands not to exceed One Hundred Sixty Acres in this State, for the purpose of holding and cultivating the same, may commence and maintain any action, in any Court of competent jurisdiction, for interference with or injustice done to his or her possession of said lands, against any person or persons so interfering with or injuring such lands or possession; Provided, always, That if any of the aforesaid class of settlers are absent from their claims continuously for a period of six months in any one year, the said person or persons shall be deemed to have forfeited all rights under this section."

In the case of *Zimmerman vs. McCurdy, supra,* there was a controversy between the parties pending before the Land Department, and the question of the possession of the land while the matter was pending before the Department was in issue before the Court. In rendering the opinion for the Court, Judge Engerud says:

> "The right to the possession of public lands is a valuable right, and is one which the Courts must enforce and protect, even though the legal title is in the government. It would be unthinkable to leave the claimants without any means to protect and enforce their conflicting claims except by force. Hence the Courts, although the title is in the government, have jurisdiction to grant appropriate remedies in behalf of an occupant or claimant of public land. The rightful claimant's possession or right to possession will always be protected or enforced against a trespasser by the appropriate action in Court when that can be done without deciding a controversy of which the Land Department has exclusive jurisdiction. Section 5919, Rev. Codes 1899; *Fulmele v. Camp,* 20 Colo. 495, 39 Pac. 407; *Matthews v. O'Brien,* 84 Minn. 505, 88 N. W. 12; *Woodsides v. Rickey,* 1 Ore. 108; *Wood v. Murray,* 85 Iowa, 505, 52 N. W. 356.
>
> When, however, as in this case, the opposing claimants' rights are in litigation before the Federal Land Office, and the Courts have, therefore, no jurisdiction to decide which of the two opposing parties is the rightful claimant, the Courts are not powerless to extend their aid to preserve the property and prevent destructive violence. The equity powers of the Courts are sufficiently broad and elastic to do justice under such circumstances, without interfering with the jurisdiction of the Federal Land Office officials to determine the ultimate rights of the claimants with respect to the land in controversy. Inasmuch as the plaintiff is in possession,

> and is contesting in the proper tribunal the validity of defendant's entry, upon which, the latter's right to take possession depends, it is clearly improper for defendant to violently dispossess plaintiff until the final result of the contest shall have disclosed which of the two have the better right."

In the case of *Wood vs. Murray, supra,* the plaintiff, the widow of a deceased pre-emptor, who had filed his declaratory statement, but had not made proof and acquired title before his death, brought suit for an injunction to restrain the defendant, a homesteader, from interfering with the peaceable possession of the plaintiff, and a temporary injunction was granted. From an order overruling defendant's motion to dissolve such injunction, an appeal was taken to the Supreme Court of the State. In rendering the opinion of the Court, Judge Given says:

> "It will be observed that neither party has acquired title from the United States. Appellant contends that, as the legal and equitable title remains in the United States, the Courts have no jurisdiction to determine which party is entitled, upon compliance with the law, to have title from the United States. The authorities are uniform in holding that this issue between the parties must be determined by the proper department of the government, and that the Courts have no jurisdiction thereof. * * * The case before us is not a contest as to title, nor as to which party is entitled, upon full compliance with the law, to receive a patent from the United States. It is simply a question whether, under the facts and circumstances, the defendant should be restrained from interfering with the plaintiff's possession pending the determination of her rights by the Secretary of the Interior. The pre-emption by Mr. Wood being the first in point of time, and sustained by the Commis-

sioner of the General Land Office as superior to defendant's claim, possession thereunder should be protected pending the appeal to the Secretary. To do so does not in anywise attempt to control the action of the Department, nor determine the question before it; it simply maintains the parties in *statu quo* until their rights are determined by the proper tribunal.

It is urged that, if she is entitled to relief, it must be by this action at law; but, as we have seen, it is not a question of title, but simply of her right to be protected in her possession, pending the appeal to the Interior Department. The law could not afford the relief which is asked, and to which we think the District Court properly held the plaintiff to be entitled. The judgment of the District Court is affirmed."

The lands settled upon by plaintiff in error being vacant lands under the law, as we have shown, he not only had the right to settle upon the lands described, but the government of the United States offers an inducement for him to do so. It having been the policy of the government for many years past to hold out inducements to persons to settle upon and acquire title to its public lands; in fact the whole policy of the government has been to dispose of its lands in this manner to actual settlers; those who are willing and ready to take up their residence thereon and occupy and improve the lands so settled upon by them, and it has been the policy of the law, both State and Federal, to fully protect such settlers in their rights.

LEGAL STATUS OF RESPONDENTS.

The complaint shows that respondents are trespassers upon public lands, and as such are preventing plaintiff in error from maintaining his settlement and residence thereon, as a bona fide settler, under the public land laws.

The lands settled upon by plaintiff in error being public lands, then the real status of the respondents is that of trespassers, and they cannot prevent the plaintiff in error, as a qualified settler, from residing thereon and occupying and improving the same, and taking all necessary steps to fully comply with the homestead law and acquire title thereunder.

Kitts vs. Austin, 83 Calif. 167.
Haven vs. Haws, 78 Calif. 514.
Whittaker vs. Pendla, 78 Calif. 296 (20 Pac. 680).
Thedmann vs. Thomas, 111 Fed. 277.

By Act of February 25, 1885, 23 St. at L. 321 (6 Fed. St. An. 536), Congress has made it unlawful for any person or persons to do the acts alleged in the complaint to have been done by the respondents herein. Section 3 of said Act provides as follows:

> "That no person, by force, threats, intimidation or by any fencing or enclosing, or any unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or

through the public lands; provided, this section shall not be held to affect the right or title of persons who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto in good faith."

Hence, under this law the respondents, in conspiring and confederating together, and in doing the other acts complained of in the complaint, to prevent the plaintiff in error from occupying the land alleged to have been settled upon by him, are doing that which is directly made unlawful, and do not have, and cannot have, any right or interest therein, or any right or interest in the possession thereof.

In the case of *United States vs. Waddell et al.*, 112 U. S. 76 (28 Law Ed. 673), Justice Miller, in delivering the opinion of the Court, speaking upon the rights of a settler upon public lands under the homestead law, says:

"The right assailed, obstructed, and its exercise prevented or intended to be prevented as set out in this petition, is very clearly a right wholly dependent upon the Act of Congress concerning the settlement and sale of the public lands of the United States. No such right exists or can exist outside of an Act of Congress. The Constitution of the United States, by Article IV, Section 3, in express terms vests in Congress the power to dispose of and make all needful rules and regulations respecting the territory or other propety of the United States. One of its regulations, the one under consideration, authorizes a class of persons, of whom Lindsey is one, to settle upon its land and, on payment of an inconsiderable sum of money and the written declaration of intention to make it a homestead, he is authorized to reside there. By building a house and making other improvements on it and residing there for five years consecutively,

which, under the statute and under that alone, he has a right to do, and paying the fees to the officer necessary to its issue, he acquires a patent or title in fee to the land.

But his title is dependent on continued residence of himself or family. By the original entry he acquires the inchoate but well-defined right to the land and its possession, which can only be perfected by continued residence, possession and cultivation for five years. His right to continue this residence for five years for that purpose is dependent upon the Act of Congress. His right to the patent, after this is done, rests exclusively on the same foundation.

The right here guaranteed is not the mere right of protection against personal violence. This, if the result of an ordinary quarrel or malice, would be cognizable under the laws of the State and by its Courts. But it is something different from that. It is the right to remain on the land in order to perform the requirements of the Act of Congress and, according to its rules, perfect his incipient title.

Whenever the acts complained of are of a character to prevent this or throw obstruction in the way of exercising this right, and for the purpose and with intent to prevent it or to injure or oppress a person because he has exercised it, then, because it is a right asserted under the law of the United States and granted by that law, those acts come within the purview of the statute and of the constitutional power of Congress to make such statute."

We therefore find that under the law, the legal status of the respondents is not only that of trespassers upon public lands, but they are doing acts in connection therewith that are made unlawful by Congress.

The complaint distinctly alleges that respondents are

not claiming the land by virtue of a settlement right, or by any right acquired or claimed under any law of the United States.

CONCLUSION.

The complaint shows that the lands within the meandered lines are good agricultural lands, susceptible of cultivation and of being used, occupied and farmed the same as any other good agricultural lands. This land is unsurveyed; the title thereto has never passed from the United States. If it is not public lands of the United States, what is it? It must have some legal status. The fact that when the surrounding lands were surveyed, this land was not surveyel, but left out of the survey and designated as a lake, does not make it a lake if it was not in fact a lake. Land cannot be turned into water by the act of a government surveyor drawing an imaginary line around it. There is no such magic in a meandered line. If it is land and not water, it is public land. If public land, it is open to settlement under the public land laws of the United States. If open to such settlement, the settlement made thereon by plaintiff in error is valid, and created in him a vested right thereto.

Our contention is that, applying the law to the facts, as alleged, the complaint shows that plaintiff in error is a qualified *bona fide* settler under the homestead laws; that the land described in the complaint and settled upon by him is vacant unsurveyed public land, subject to settlement and residence by plaintiff in error under the homestead settlement laws of the United States; that respondents are shown to be trespassers upon public lands, and in preventing and interfering with the settle-

ment and residence of plaintiff in error, they are violating a federal law (23 St. at L. 321), and have no standing in Court.

The State Supreme Court in its decision conceded that if the land is vacant, unsurveyed public land, plaintiff in error has the right of possession, and has set forth in his complaint a good cause of action. But maintains that as the complaint shows that the land, at the time of the survey of the townships, was not surveyed but meandered as a lake, the Land Department has thereby classified it as a lake, and therefore it is not subject to settlement under the homestead laws. Basing its ruling in this regard upon the ground, that if the Courts should hold that it was public land instead of a lake it would amount to the undoing by the Courts of that which the Secretary of the Interior has done in the administration of the public lands. In other words, it makes no difference whether in fact what is contained within the meandered lines is a body of water, or high class agricultural lands, so far as the Courts, or would-be settlers, are concerned, it is a lake, because so designated at the time the surrounding lands were surveyed.

In the natural course of things, land is land, and water is water. If land, it is either public or private; that is, owned and held either by the government, or by private ownership. If public it is either reserved for some especial purpose, or open to settlement and acquisition by those having the necessary qualifications. If reserved, it must be so reserved either by or through an act of Congress. And if not so reserved, it is open to settlement (and if surveyed entry) under the public land laws of the United States. We know of no law that confers upon the Secretary of the Interior or the Land Department the exclusive power to designate, and

determine what shall be public lands and what shall not be. Neither do we know of any power conferred upon the Land Department to designate agricultural land as a body of water, and thereby withdraw same from settlement under the public land laws. Unquestionably the Land Department has charge of the survey of public lands. We do not question that proposition in any way. Plaintiff in error is not asking the Court to modify or change the survey in the instant case in any particular, althought the State Supreme Court, judging from its opinion, seemed to think that is what is being attempted. Plaintiff in error simply alleges that in making the survey of the townships, in which the land is located, there was approximately 1200 acres of good agricultural land not surveyed; that he is a qualified homestead settler and in good faith made settlement and established his residence upon a portion of that land, and has been prevented from continuing such settlement and residence by reason of the wrongful and unlawful acts of respondents. Under these conditions, it cannot be that the Courts are without jurisdiction to grant relief. If so, we are brought face to face with a wrong without a remedy. Here we have a tract of unsurveyed, unalienated public land, upon which plaintiff in error has made a *bona fide* settlement, and establishes his residence for the purpose of eventually acquiring title thereto under the federal homestead laws. According to the complaint he is the only person who has any interest therein, or any right to the possession thereof. As said by the State Supreme Court in its opinion, "In this kind of an action, the plaintiff, if he prevails at all, must prevail upon the strength of his own title, and not upon the weakness of that of his adversary." Adopting this rule as the fundamental principle upon which this case must be decided, we maintain that the

complaint state a cause of action. The federal homestead laws, not only permit plaintiff in error to make settlement and maintain a residence upon unappropriated and unsurveyed public lands, but provides that by so doing he may eventually acquire title to the land so settled upon. The right thus guaranteed is a valuable one, and one which the Courts are bound to recognize and protect. We are not asking the Court to order a survey of the 1200 acres of land lying within the meandered lines. That is a matter in which the Courts are not interested at this time. The real question in this case is whether or not, when by reason of error, mistake or fraud in the making of a survey, lands have not been included therein, and remain a part of the public domain, by reason of their non-alienation by the government, such lands can be settled upon by a qualified homestead settler, and that such settlement be protected by the Courts. With all due respect to the State Court, we maintain that not one of the decisions cited by the State Supreme Court in its decision in the instant case is decisive, and—we are almost tempted to say—even touches the real question here involved. In the case of *Kirwan s. Murphy,* 189 U. S. 35, cited in the opinion, the sole question involved, was as to whether the Courts had jurisdiction to enjoin the making of a survey ordered by the Secretary of the Interior. In that case, it is shown that the amount of land within the meandered lines, was approximately 1200 acres, as in the case at bar, and it is further shown that at least a portion of that land was occupied by settlers claiming under the settlement laws of the United States, but their rights are in no way considered or determined, or in any manner brought before the Court in that case. And it is so held by Justice Peckham in his opinion rendered in the case of *Security Land & Ex. Co. vs. Burns, supra*

(193 U. S. 168), a case involving the rights of a settler upon land within the meandered lines, a survey of which was sought to be enjoined in the *Kirwan* case. Speaking on this question and referring to the *Kirwan* case, Justice Peckham, in *Security L. & E. Co.*, on page 188 of the Report, says:

> "The exact point involved here was not presented in that case, and this Court held that it could not be passed upon in that proceeding."

The other cases cited and relied upon in the decision of the State Supreme Court are along the same line; dealing with questions not before the Court in the case at bar.

As we view the law, and apply it to the facts, as presented by the complaint in this case, it appears to us that the cases of *Security Land & Ex. Co. vs. Burns, supra*, and *French-Glenn Live Stock Co. vs. Springs, supra* (185 U. S. 47), are conclusive in favor of plaintic in error, and that the decision of the State Supreme Court in this case is in direct conflict with the decisions of this court in those, and other cases bearing upon the questions here involved, and denies to plaintiff in error the rights and privileges granted him under the homestead settlement laws of the United States.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM.

EDWIN L. GAUTHIER,
Plaintiff in Error,
vs.
PETER MORRISON, N. L. NEEDHAM, M. A. SAUNDERS and MINNIE SAUNDERS,
Defendants in Error.

No. 157

Error to the Supreme Court of the State of Washington.

Brief for Defendants in Error.

STATEMENT.

A motion to dismiss, and brief thereon, for defendants in error, have heretofore been served and filed in this court. In the event, however, that the case shall not be disposed of on motion, but shall go to hearing on the merits, we submit this discussion of the merits.

The complaint alleges that the land in controversy is vacant, public land, that patent has never issued therefor, that title is in the United States, and that it has, by the United States officials, been fraudulently surveyed and classified as a lake, and the court below was asked by plaintiff in error to declare this survey and classification, made by the Interior Department in 1877, to be fraudulent and void, and to adjudge that the land is agricultural land and open to settlement under the homestead laws, notwithstanding the governmental action to the contrary. The complaint is short and for its contents we refer to it instead of following plaintiff in error's statement thereof. (Trans. pp. 2-6.) The supreme court of the state of Washington held that the state courts were without jurisdiction of the action upon the facts pleaded, and affirmed the judgment of the trial court dismissing the action. (Trans. pp. 17-28.)

BRIEF.

THERE IS NO JURISDICTION IN THE STATE COURTS OF THE SUBJECT-MATTER OF THIS ACTION.

Plaintiff in error states on page 8 of his brief that "the question before the court is whether * * * the complaint states a cause of action." This is error. The principal question relied upon below in support of the demurrer, and on which the court below decided the case adversely to plaintiff in error, was the question of jurisdiction. The court below said: "We are clear, therefore, that the state courts have no jurisdiction of this case under the facts alleged, and that the remedy of the appellant, if he has any, is in the Land Department of the United State government." (Trans., p. 18.) And this question is again raised here by the demand of the plaintiff in error that the facts recited in his complaint be tried, and that the courts shall "determine the legal status of the land." (Plaintiff in error's brief, p. 8.) The matter presented in plaintiff in error's brief, from page 8 to page 21 inclusive, can have no other purpose than to induce the court to have the facts pleaded tried out, and from them, when proved to be as pleaded, to "determine the legal status of the land."

This is a possessory action. In the complaint plaintiff in error alleges his right to possession of the land and prays that he be given it. On page 4 of his brief, plaintiff in error says: "Plaintiff in error prays the judgment of the court for the possession of the lands settled upon by him as described in the complaint, in order to enable him to comply with the requirements of the homestead laws"—that is, to enable him to compel a conveyance by the United States. It is therefore necessary for the plaintiff in error, in order to recover, to show affirmatively a right to the lands in himself. He cannot lean on the alleged fact that the defendants in error have no right or are trespassers.

"Whatever may be the technical law on this subject, it is unimportant here for the reason that in this kind of an action the plaintiff, if he prevails at all must prevail upon the strength of his own title and not upon the weakness of that of the adversary. The basis of this complaint is a possessory right."

George v. Columbia & Puget S. R. C., 38 Wash. 483.
Helm v. Johnson, 40 Wash. 422.
Humphrey v. Stevenson, 33 Wash. 570.
Seymour v. Dufour, 53 Wash. 650.

Plaintiff in error bases this right, which he is compelled to show, on the alleged fact that he is a settler *upon land of the character which can be acquired under the homestead laws*, putting the character of the land squarely in issue, to be de-

cided by the court, or a jury, and on page 31 of his brief, in stating his exact contention, he says: "Our contention is * * * that the land * * * settled upon by him is vacant, unsurveyed public land, subject to settlement and residence by plaintiff in error under the homestead settlement laws of the United States."

Of this question of the character of the land, upon the facts pleaded, we submit, the court below had no jurisdiction.

The complaint recites that patent has not issued and title is in the United States. The complaint further recites "that in the year 1877 the Government of the United States caused to be surveyed Townships 24 and 25"; that the survey so made by the United States was made by a surveyor employed by the United States for that purpose. The complaint then charges that the survey of its own lands so made by the United States is fraudulent. (Paragraphs I, II, Trans. pp. 2, 3.) It does not lessen the charge of fraudulent action by the United States in connection with its land, as between the United States and plaintiff in error, we submit, that it is alleged that the fraud was perpetrated by the agent of the United States; the United States can act at all only through agents. Paragraph II of the complaint shows with certainty that there was *some* water on the ground and *some* basis for the Government's classification of these lands as a

lake, and, even though fraud was not charged, the *fact* would still have to be litigated in this action and proved as to whether appellant's opinion is correct that there was not *enough* water to constiinto a lake, or whether the classification of the Government, through the proper department and agents, that there was enough water to constitute a lake, is correct. The facts alleged to show that the action of the United States is fraudulent in regard to these lands, are set out in the complaint thus:

"And in such survey wrongfully, erroneously and fraudulently designated the lands in said sections lying and being within the meandered lines, as made by such survey, as a lake, and by so doing wrongfully, erroneously and fraudulently designated by means of such survey an area of land within such townships and within said sections in a contiguous body containing approximately 1200 acres and lying and being within said meandered lines as aforesaid, as a lake, and wrongfully, erroneously and fraudulently failed and neglected to survey the same, or any part thereof, and no part thereof has since been surveyed by the Government of the United States." (Trans. p. 3.)

Upon this recitation of fraudulent action by the United States in controlling Government land, the complaint assumes the action of the Government to be void and the land open to settlement; that it is not a lake, never was a lake, was fraudulently classed by the Government as a lake, and that such action must be undone and the fraudulent classifi-

cation rectified. When this finding of fraud upon the part of the United States shall be made by the courts, the Government's action reversed, and the obligation on the part of the United States to make another survey and another classification of this land declared by the court's judgment, then, and not till then, we submit, will this plaintiff in error be able to show any affirmative right to settle upon and purchase these lands and secure patent from the United States.

It has long been settled by this court that the exclusive control of public lands is in the Interior Department and remains exclusively there until patent has issued therefor and the title has passed from the Government. There is no jurisdiction in the courts either to control the public land or the action of the Government in connection therewith, until patent shall have issued and the land shall have ceased to be public land. Until such time the jurisdiction is exclusively in the Government of all questions affecting the status of the land or the action of the Government in connection therewith.

The question presented here is not what is the effect of the survey and classification made by the United States, but is—has the court below *now* any jurisdiction to consider that or any other question involving the disposition by the United States of these lands, or involving the determination of

the right or wrong of the action of the Interior Department in administering them.

Section 453 of the U. S. Revised Statutes (6 Fed. Stats. Anno. 212), provides as follows:

"The commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, *or in anywise respecting such public lands,* and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the Government."

Section 2218 of the United States Revised Statutes provides:

"The Secretary of the Interior shall take all necessary measures for the completion of the surveys in the general surveying districts for which surveyor generals have been and may be appointed * * *."

Section 2219 of the United States Revised Statutes provides:

"In all cases where, as provided in the preceding section, the field notes, maps, records and other papers pertaining to land titles in any state are turned over to the authorities of such state, the same authority, powers and duties in relation to the survey, and resurvey, or subdivision of land therein and all matters and things connected therewith, as previously exercised by the surveyor general whose district included such state shall be vested in and devolve upon the commissioner of the General Land Office."

The seventh paragraph of Section 2395 of the United States Revised Statutes, is as follows:

"Every surveyor shall note in his field book the true situations of all mines, salt licks, salt springs and mill seats which comes to his knowledge; all water courses over which the line he runs may pass; and also the quality of the lands."

The act of Congress of March 3, 1909 (Supp. to Fed. Stats. Ann. 563), provides as follows:

"That the Secretary of the Interior may, in his discretion, cause to be made as he may deem wise under the rectangular system now provided by law, *such resurvey* or retracements of the surveys of public lands as, *after full investigation, he* may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, that no such resurvey or retracement shall be so executed as to impair the *bona fide* rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: Provided, further, that not to exceed five per cent of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby."

Bearing in mind that the complaint alleges that the land is still owned by the United States and that patent has not issued therefor, it is not difficult, upon the foregoing legislation, to reach the conclusion that the courts of the state cannot undo what the Secretary of the Interior has done in the course of his administration of the public lands, or decree rights to be in private parties in the land, which, for their validity, rest upon the contingency and the necessity of the Secretary of the Interior

undoing what he has already done and doing something different.

In the early and leading case on the question of jurisdiction in the state court, *before patent,* over the land and action of the Government in connection therewith, *viz.,* Cragin v. Powell, 128 U. S. 691, this court said:

"That the power to make and correct surveys of the public lands belong to the political department of the government, and that, *whilst the lands are subject to the supervision of the General Land Office,* the decisions of that bureau in all cases, like that of other special tribunals upon matters within their exclusive jurisdiction, are unassailable by the courts, except by a direct proceeding; and that the latter have no concurrent or original power to make similar corrections, if not an elementary principle of our land law, is settled by such a mass of decisions of this court that its mere statement is sufficient. * * * The reason for this rule, as stated by Justice Catron in the case of Haydel v. Dufresne, is 'that great confusion and litigation would ensue if the judicial tribunals were permitted to interfere and overthrow the public surveys on no other ground than an opinion that they could have the work in the field better done and divisions more equitably made than the department of public lands could do'."

This declaration of lack of jurisdiction in the courts, prior to the issuance of patent, has been many times affirmed by this court.

United States v. Schurz, 102 U. S. 378.
Stoneroad v. Stoneroad, 158 U. S. 240.
Russell v. Maxwell Land Grant Company, 158 U. S. 253.

Knight v. United Land Association, 142 U. S. 161.
Kirwan v. Murphy, 189 U. S. 35.
Humbird v. Avery, 195 U. S. 480.

One of the latest cases is that of Kirwan v. Murphy, *supra.* In that case there was a fraudulent survey proven, and an attempt on the part of the Secretary of the Interior to exercise his discretion and make a new survey, and a bill was filed to enjoin such resurvey, on behalf of certain land owners claiming to own the bed of a lake by riparian right. The court, in dismissing the bill, and sustaining the Secretary's exclusive jurisdiction over the land, both past and prospective, said:

"The Land Department must necessarily consider and determine what are public lands, what lands have been surveyed, what are to be surveyed, what have been disposed of, what remain to be disposed of, and what are reserved. The Department has held that the land lying between the alleged meander line and the lake, some 1,200 acres, is Government land, and has ordered it to be surveyed. Re Burns, 20 Land Dec. 28, 295, 23 Land Dec. 430. The execution of that order was restrained by the preliminary injunction herein, and that has been made perpetual by the decree.

We are confronted on the threshold with two objections to the maintenance of this bill; namely, the want of jurisdiction in equity, *and the want of jurisdiction thus to interfere with executive administration.* * * *

The administration of the public lands is vested in the Land Department, and its power in that regard cannot be divested by the fraudulent action of a subordinate officer, outside of his authority,

and in violation of the statute. Whiteside v. United States, 93 U. S. 247; Moffat v. United States, 112 U. S. 24; Hume v. United States, 132 U. S. 406. *The courts can neither correct nor make surveys. The power to do so is reposed in the political department of the Government, and the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action.* Brown v. Hitchcock, 173 U. S. 473." (Italics ours.)

There are, however, a number of cases which have applied this general principle, of exclusive jurisdiction in the Interior Department, to the specific case of the designation of the *character* of the land. In the case at bar, the land was, in the exercise of the department's discretion and exclusive control, determined to be, and designated as, a lake. In these cases now referred to, the department, exercising this unlimited power before patent, determined the land to be swamp land or not swamp land, and in each case this court held that the department's determination of the character of the land could not be interfered with by the courts prior to the issuance of patent.

Michigan Land & Lumber Co. v. Rust, 168 U. S. 589.
Brown v. Hitchcock, 173 U. S. 473.
Oregon v. Hitchcock, 202 U. S. 60.

In Michigan Land & Lumber Co. v. Rust, *supra,* the Secretary of the Interior had designated cer-

tain land to be swamp land and thereafter reconsidered this action before patent had finally issued. It was contended that the jurisdiction of the Secretary had ceased upon the first designation of the character of the land, and that, therefore, the courts could control his future action regarding them, but this court held that the jurisdiction still continued in the department until the final issuance of patent and fully authorized its subsequent reconsideration and designation as to the character of the lands involved, saying:

"Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the Land Department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. * * * Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title (Rev. Stat. §2449; Frasher v. O'Connor, 115 U. S. 102), but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the Government until the issue of the patent (Bagnell v. Broderick, 38 U. S. 13 Pet. 426-450); and while so remaining the grant is in process of administration, and the jurisdiction of the Land Department is not lost. * * *

And, again, on page 181 is this language: 'The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not

entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands.' See also Orchard v. Alexander, 157 U. S. 372, 381, 382; Warner Valley Stock Company v. Smith, 165 U. S. 28, 34. This jurisdiction extends to the ordering of new surveys whenever in the judgment of the department there has been error or fraud in those already made. Cragin v. Powell, 128 U. S. 691. In Tubbs v. Wilholt, 138 U. S. 134, 143, the court quoted with approval this passage from a letter of the Secretary of the Interior: 'There can be no doubt but that under the act of July 4, 1836, reorganizing the General Land Office, the commissioner has general supervision over all surveys, and that authority is exercised whenever error or fraud is alleged on the part of the surveyor general.' And in New Orleans v. Paine, 147 U. S. 261, the question was presented as to the power of the department to order a new survey, and on page 266 the rule was thus stated: 'If the department was not satisfied with this survey there was no rule of law standing in the way of its ordering another. Until the matter is closed by final action, the proceedings of an officer of a department are as much open to review or reversal by himself, or his successor, as are the interlocutory decrees of a court open to review upon the final hearing.'

So, notwithstanding that a survey had been made and that such survey indicated that the land in controversy was swampy land, and, therefore, passing under the act of 1850 to the state of Michigan, it was within the power of the Land Department, at any time prior to the issue of a patent, of its own motion, to order a resurvey, and correct by that any mistakes in the prior survey."

In the case of Brown v. Hitchcock, *supra,* an injunction was sought restraining the Secretary of the Interior from disposing of certain land as public land and from holding them to be such subject to entry, on the ground that Henry M. Teller, Secretary of the Interior, had designated them as "swamp and overflowed lands," and that plaintiff had acquired title to them as such, and that Henry M. Teller's successor, as secretary, had reconsidered Mr. Teller's action and designated the lands as not swamp or overflowed, and was threatening to sell them as other than swamp or overflowed. In dismissing the bill for an injunction, the court said:

"In this case the record disclosed no patent and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the state, the legal title remained in the United States. Until the legal title to public land passes from the Government, inquiry as to all equitable rights comes within the cognizance of the Land Department. In United States v. Schurz, 102 U. S. 396, which was an application for a mandamus to compel delivery of a patent, it was said: 'Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. This court has, with a strong hand, upheld the doctrine that so long as the legal title to these lands remained in the United States and the proceedings for acquiring it were as yet *in fieri,* the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still

adhere.' * * * The dissent announced by the chief justice only emphasizes the proposition laid down in the opinion as heretofore quoted, that so long as the legal title remains in the Government, all questions of right should be solved by appeal to the Land Department and not to the courts. * * * But what we do affirm and reiterate is that power is vested in the department to determine all questions of equitable right or title upon proper notice to the parties interested and that the courts must, as a general rule, be resorted to only when the legal title has passed from the Government. When it has so passed, the litigation will proceed, as it generally ought to proceed, in the locality where the property is situated, and not here where the administrative functions of the Government are carried on."

The last case discussing the exclusive jurisdiction of the department to designate the character of the land, or redesignate the character of the land if need be, and to decide upon the necessity of such redesignation, is that of Oregon v. Hitchcock, *supra*. In that case a bill was brought to restrain the Secretary of the Interior and the Commissioner of the General Land Office from allotting and patenting in severalty swamp lands within an Indian reservation. On demurrer the bill was dismissed. It was found that the Secretary of the Interior had not yet designated such lands as swamp lands, as he has not yet, in the case at bar, designated the land involved here as other than a lake, or as such public lands as are open to settle-

ment. The court, in dismissing the bill, said:

"Again, it must be noticed that the legal title to all these tracts of land is still in the Government. No patents or conveyances of any kind have been executed. There has been no finding or adjudication by the Land Department that the lands referred to were swamp or overflowed on March 12, 1860. Under these circumstances it is not a province of the courts to interfere with the Land Department in its administration. So far as a grant of swamp lands is claimed, it must be held that the grant is in process of administration, and, until the legal title passes from the Government, inquiry as to equitable rights comes within the cognizance of the Land Department. *Courts may not anticipate its action, or take upon themselves the administration of the land grants of the United States.*"

The doctrine thus announced by this court has been announced and followed by the supreme court of the state of Washington.

Columbia Canal Co. v. Benham, 47 Wash. 249.

That the *classification* of the public lands for the purposes of disposition under the various acts of Congress is a part of the duty imposed by law upon the Secretary of the Interior, and that, even after patent has issued, his determination can not be reversed by a mere intruder without title, is clearly stated by this court.

Ehrhardt v. Hogaboom, 115 U. S. 67.

In that case the court said:

"It is the duty of the Land Department, of

which the Secretary is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and his judgment as to this fact is not open to contestation, in an action at law, by a mere intruder without title."

It is submitted that upon the statute law, the very necessity of the case, and the clear and explicit utterances of this court, the lack of jurisdiction in the court below is put beyond question.

UNITED STATES IT NOT A PARTY.

The second point presented to the court below, to-wit, that the United States is not made a party, but adds weight to and accentuates the lack of jurisdiction. The establishing by plaintiff in error of a right under this complaint depends on his proving, first, the charge of fraud against the United States, and, second, the determination of the fact that the lands are in a different classification from that designated by the Interior Department, and in accord with which designation they are being treated by the Interior Department. Here is a serious conflict with the United States, both as to how it shall handle its own lands and as to whether it has committed a fraud or not. The mere statement of this condition, we submit, shows the situation to be an impossible one. In the case of Michigan Land & Lumber Company v. Rust, *supra,* the court,

quoting from Knight v. United States Land Association, 142 U. S. 161, referring to the Secretary of the Interior, said:

"He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands."

Where the substantial relief asked by the bill is against the United States, which is not a party, the bill should be dismissed.

Case v. Terrell, 11 Wallace, 199.

THE CASES RELIED ON BY APPELLANT.

This litigation has been inspired, it is submitted, by a misunderstanding of the scope and effect of three or four decisions of this court. After an analysis of the foregoing legislation and authorities, one would not be warranted, it is submitted, in reaching the conclusion that subsequent decisions of this court have vested jurisdiction of lands before patent, and the power to review the Secretary's action with regard thereto, in the courts, unless these prior decisions were in express terms reversed. It is submitted that decisions reversing this long established doctrine do not exist, and the decisions which have been presented to this court on behalf of plaintiff in error do not occasion any change in that long established rule. They are perfectly consistent with it and entirely without application in the present action. We discuss a

few of them which illustrate the cases of this class. (Plaintiff in error's brief, p. 12.)

In Niles v. Cedarpoint Club, 175 U. S. 300, the lands in controversy were no longer owned by the United States, patent having issued to private parties. The subject of the controversy was, therefore, no longer within the jurisdiction of the Interior Department as it is in the case at bar. The question was one of ownership between the patentee of the United States and one claiming to own the same land, as a riparian right, by virtue of the ownership of contiguous lands, all of the land in question being patented, the statement by Mr. Justice Brewer reciting:

"This controversy is between two claimants to land, one holding a patent therefor from the United States and the other claiming it by virtue of its contiguity to other land for which a United States patent was held."

It is submitted that on the question of jurisdiction this case is clearly not in point. When land has been patented, it is familiar law that the jurisdiction of the state courts at once attaches for all purposes, and all disputes arising then between private owners with regard to it, *ex necessitate,* must be decided by the courts.

The cases most relied upon by plaintiff in error, we think, are French Glenn Live Stock Co. v. Springer, 185 U. S. 47, and Security Land and Exploration Co. v. Burns, 193 U. S. 168. Those

actions were respectively to recover possession of lands which were held by the defendants and lay below the meander lines that bordered plaintiff's *patented* lands. All the claims pleaded and shown by plaintiffs were that they respectively owned the lands below the meander lines purely and solely as an incident to or a part of the land above the meander line, for which latter they held patents. The land was claimed as a riparian incident of the upland and it was alleged that the rights thereto were within, granted by, and received from the respective patents. The allegations there were that the patent *had* issued—that the Secretary of the Interior no longer had jurisdiction—*not,* as in the case at bar, that the patent had *not* issued.

The actual questions were—Did the *patent* carry such rights below the line? Were the lands below the line riparian incidents of the *patented* lands? Of course these riparian rights being alleged to be incidents of the patented uplands and so a part thereof, and so patented, were, upon the allegations made, out of the jurisdiction of the Interior Department and within that of the courts. The jurisdiction of the state court over land which has been patented and over all incidents to the patented land, must be conceded, for the incidents must go with the jurisdiction of the main thing, to-wit, the patented land; and it must equally be conceded that the question, what

riparian rights are incident to land which has been patented by the United States, is within the jurisdiction of the state court. (Packer v. Bird, 137 U. S. 661; Hardin v. Jordan, 140 U. S. 371; Shivley v. Bowlby, 152 U. S. 1; Kneeland v. Korter 40 Wash. 359.) It has been further held by the cases just cited that the laws of the state determine just what riparian rights attach, in or under water, to lands patented by the United States. It is the rule of law generally that riparian rights attach to land by virtue of the land *actually bordering on water.* No court has ever held that riparian rights were created by land bordering on a meander line. The meander line is but a convenience run by the Government to determine the acreage for which payment is to be exacted. (St. P. & P. R. R. Co. v. Schurmeier, 7 Wall. 272; Griffith v. Holman, 23 Wash. 347; Washougal etc. Co. v. Dalles etc. Co., 27 Wash. 487.) Under the rule of law of the state, therefore, in exercising its jurisdiction to determine the incidents to land patented and to determine what riparian rights attach to lands patented, it was necessary, in Security Land & Exploration Co. v. Burns, and French Glenn Live Stock Co. v. Springer, *supra,* to determine, not the presence of a meander line or that the Secretary of the Interior had said there was water present, but that in fact the water was there. The *actual fact,* under the state law, is the guide. The fact as to the char-

acter of the adjoining Government land was determined only so far as it affected the lands actually patented, and determined the scope of the patent, and as affecting a matter actually within the court's jurisdiction. The defendants in those cases were not compelled to establish any affirmative right in the Government's land and did not. The burden in those possessory actions was clearly on the plaintiffs to prove their own title. The Government survey and plat were put in the case as conclusive proof that the patent did not carry below the line and to estop that fact from being questioned. The question in the case was as to the effect of this proof. The jurisdiction rested on the allegations of patented lands and no question with regard to the jurisdiction was raised.

PLAINTIFF IN ERROR WAS A MERE SQUATTER UPON THE POSSESSION OF DEFENDANTS IN ERROR.

When the plaintiff in error has shown, as he has affirmatively shown in his pleadings, that the land is classified, under the law, as of such character that he cannot have a present right of any kind in it, and cannot have, as between himself and the United States a present right to take any step to secure it in the future, the Secretary's classification in that regard being a conclusive one in this court—in other words, when he has shown the

land to be *now* of such character that it cannot be acquired under the homestead laws, he has stripped himself of all right and has become a mere squatter. He does not even show that he has asked the Secretary of the Interior to exercise *his* jurisdiction and reclassify the lands. He has, when it comes to a measurement of merits, or equities, not so much right there as the respondents. A careful reading of the complaint will show that the defendants in error were in possession of the land before the plaintiff in error, and assuming defendants in error to be trespassers, as alleged, yet as between squatters, the maxim *prior tempore potior jure* would apply. The complaint was executed on February 7, 1910, and paragraph IV recites "that said defendants, without any right so to do, have *heretofore* wrongfully and unlawfully *occupied, cultivated* and *cropped* the said lands * * * and for the purpose of enabling the defendants, and each of them, to wrongfully and unlawfully *continue* to occupy, crop, cultivate and control the lands," etc. To *cultivate* and *crop* the lands necessitated possession by defendants in error during the prior summer of 1909. The appellant did not go upon the land, as shown by paragraph III of the complaint, until *after* the season for cultivation and crops had passed, to-wit, on the 30th day of October, 1909. Defendants in error, therefore, have the better right.

The affirmative outlawed state into which plaintiff in error has pleaded himself by setting forth the survey and classification, distinguishes this case from those cited on pages 24 and 27 of plaintiff in error's brief. In none of them was it shown that the land was of such a character that the party asking for relief could not acquire it. Zimmerman v. McCurdy, 106 N. W. 125, and Wood v. Murray, 52 N. W. 356, extensively quoted by plaintiff in error in his brief, are fair illustrations of these cases. In the latter case the fact that the land was of such a character that a right could be initiated by settlement was admitted. The plaintiff was in possession of the land and asked that defendant be restrained from preventing her from cultivating it. The question of who had the better right to the land between plaintiff and defendant was then pending before the Secretary of the Interior on appeal. The court said the court would not decide the question of right to the land or any question which was to be decided by the Secretary of the Interior. In the case at bar the court is asked to decide the character of the land and to reverse the Secretary's classification. The court, in Wood v. Murray, further held that the *plaintiff was in possession* and was there *first,* and already had a decision of the Commissioner of the General Land Office in her favor, and that, by reason of the facts

peculiar to that case she was entitled to injunction to maintain that status, saying: "To do so does not in anywise attempt to control the action of the department, nor determine the question before it; it simply maintains the parties in *statu quo* until their rights are determined by the proper tribunal." Of course, plaintiff in error can show no equity entitling him to injunction or other equitable relief, irrespective of the fact that his suit is ejectment or for possession. While his complaint shows that he has been ejected from the land, it also shows that he intruded on the possession of the defendants in error, who are still in possession. The real effect of these cases in the case at bar, if they be taken as a precedent, is that, if the courts do anything, they must keep the defendants in error in their possession—maintain the parties in *statu quo*—until the plaintiff in error has started a proper proceeding before the Secretary of the Interior and has procured a decision from him reversing his former classification.

The case of Zimmerman v. McCurdy, *supra,* is of the same type as the one just discussed. The court said: "The rightful claimant's possession or right to possession will always be protected or enforced against a trespasser by the appropriate action in court when that can be done without deciding a controversy of which the Land Department has exclusive jurisdiction." But in the case

at bar it is necessary to reverse the existing classification, a question of which the Land Department has exclusive jurisdiction, before any right can be shown in plaintiff in error. The court further held in that case that it could not decide any question of right, but that under its equity powers, *plaintiff having been first in possession and still being there,* and having started a contest in the proper tribunal, to-wit, the Land Department, against the defendant, the court could preserve the then existing status—could enjoin "to preserve the property and prevent destructive violence." It was also unquestioned that the land was of such character that it was subject to entry under the homestead laws, the Government having permitted entry thereon.

In Matthews v. O'Brien, 88 N. W. 12, cited by plaintiff in error, it was not only not shown that the land was of such character that it could *not* be secured under the homestead laws, but on the contrary an entry had been made and allowed by the land officers, thus declaring that the land could be so acquired. In the case at bar plaintiff in error has made no entry, presumably because, the lands being authoritatively classified as a lake, the land officers will not permit it. Certainly a homestead entry will not be permitted until, in an appropriate separate proceeding before the Interior Department, a

resurvey and classification is sought for and secured. All the plaintiff in error has on which to base this action is the *hope* that sometime he may be able to bring such proceeding and induce the Secretary of the Interior to undo the existing classification and so make it possible for plaintiff in error to *initiate* a right under the homestead laws.

It is true that section 942 of the Remington & Ballinger Code provides that any person occupying and settled upon unsurveyed public lands can bring an action, but that does not mean any one occupying and settled upon lands which the Government does not atuhorize or permit to be acquired by occupation and settlement. The statute was passed to protect the right to *acquire,* not the assumed right to squat or trespass on land not open to acquisition. If the Government, by competent authority, had previously designated public land as a military or Indian reservation, it is hardly likely that a squatter on such lands could, under this statute, induce the courts to indefinitely hold him there, on the mere hope that he could induce the Government officials to change the classification and throw them open to settlement and permit him to make an entry. It is a possessory action under this statute, and like all possessory actions, it must be based on the plaintiff's own right, not on the defendant's lack of it.

The case of Colwell v. Smith, 1 Wash. Ter. 92, and Ward v. Moore, Ib. 104, are of the same character as those already discussed and need no separate discussion. The case of La Chapelle v. Bubb, 69 Fed. 481, follows these Washington cases. The plaintiff in that case had complied with the homestead laws on land which had been classified as open to settlement under them. Thereafter the land was included in an Indian allotment and the homestead filing was canceled. The plaintiff did not show, as he does in the case at bar, at the threshold of his case, that because of the character of the land he never had a right to be there. All the federal court did in that case was to hold that the Indian Agent had no authority to resort to violence off the Indian reservation and restrained him from further torts of like character. In saying, impliedly, that, *after* the Secretary, upon hearing had, had canceled the homestead entry, and before patent had issued, the disposition of the lands by the Secretary could be controlled by the courts, we submit the learned judge has gone beyond the clearly established law.

The case of Hebeisen v. Hatchell, 69 Pac. 88, cited by plaintiff in error in this group, holds squarely against him.

The other cases of the group now discussed need no special consideration. They are distinguished as are those we have already discussed.

The case of United States v. Waddell, 112 U. S. 76, cited on page 29 of plaintiff in error's brief has no help for him. It was there held that the petitioner would be protected in a right derived from an act of Congress and that "no such right exists or can exist outside of an act of Congress." But there is no act of Congress which gives the right to acquire lands under the homestead laws which are not of the character necessary to homestead acquisition, nor any act that vests jurisdiction of the determination of their character, prior to patent, in the courts.

IF JURISDICTION IS TAKEN BY THE COURTS IT CANNOT BE MADE EFFECTIVE.

The wholly untenable character of the position taken here by the plaintiff in error, we submit, is forcibly demonstrated by the consequences which would follow upon the exercise of jurisdiction by the courts below, which has already been emphasized by this court.

In 1889, F. M. Pugh and others started a proceeding to secure a resurvey by the Secretary of the Interior of a part of the land now in question, *viz.*, that part of Saltese Lake bed *then* bare, lying between the meander line and the edge of the water.

F. M. Pugh et al., 14 L. D. 274.

As shown in that case, at that time the lake was only partly drained, and therefore, a lake had *then* to be admitted, but the bare ground between the meander line and the water was claimed to be unsurveyed Government land which was open to settlement. Evidence was taken, as shown by the decision of the Secretary above, and, upon the record presented to him he held that the land in controversy was a lake; that the amount of land then bare between the meander line and the water did not make its condition as a lake different from what it was when surveyed, and that the department still held it not to be public land open to settlement. The complaint in the case at bar shows that the original action of the Department of the Interior with regard to these lands has to be reversed before the appellant can secure any right to them as a homestead. This same attempt to reverse the original survey, and the action of the Secretary of the Interior in establishing the character of these lands, was attempted in 1889, though there it was attempted before the Secretary of the Interior who *had* jurisdiction, while here it is attempted to reverse the action of the department which is pleaded, before the courts, which, it is submitted, have no jurisdiction.

Now let us suppose that the courts shall hold ultimately that the United States, in making its survey, has perpetrated a fraud, as charged, and

has falsely designated and determined this land to be a lake, when it is no lake, and that the plaintiff in error, is, therefore, entitled to settle upon and to receive eventually from the United States a patent for these lands as a homestead. Having thus established in this plaintiff in error, an inchoate legal right as against the United States, which under the existing laws of Congress he would be entitled to perfect and so receive his patent, the plaintiff in error applies at the land office to be permitted to file his entry, and, ultimately, by instruction from the Secretary of the Interior, his application is denied, and he is refused the right which the courts have adjudged to be his, on the ground that the land was theretofore classified as a lake and the Department would not reverse the original action of 1877. Would not the courts, under these circumstances, have done an idle thing in entertaining jurisdiction? When the Secretary of the Interior has again adhered to the original classification and has refused this plaintiff in error the right to homestead, would the courts then mandamus the Secretary of the Interior to compel him to reverse his former action in the classification of these lands, make them public lands open for settlement, resurvey them, and accept the plaintiff in error's filing of his homestead entry? The cases of United State v. Schurz and Kirwan v. Murphy, *supra,* and a long line of similar cases make such

course, we submit, impossible, and would render utterly nugatory the judgment of the courts if they took jurisdiction of this action. We call attention to this decision of the Secretary as showing that any action of the courts in the premises would be entirely ineffective, and, therefore, it cannot be supposed that jurisdiction is given. And if the Secretary shall *never* rule these lands to be of such character as that they may be acquired under the homestead law and the plaintiff in error never secure any *right* therein, or to be thereon, yet under the court's judgment, if rendered in favor of plaintiff in error, the plaintiff in error would have permanent possession and the defendant in error must pay the judgment for costs.

The plaintiff in error can not be heard to complain of hardship in being refused a standing in the courts. There is a proper forum, to-wit: the Department of the Interior, where appropriate relief can be given him. He has but to secure from the exclusive jurisdiction of that department a reversal of its classification, now standing for thirty-six years, in order to *initiate* the rightful possession which he now lacks.

Respectfully submitted,

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